Supreme Court, U.S.
FILED
JUL 21 2006
OFFICE OF THE CLERK

No. 06-118

IN THE

United States Supreme Court

MICHAEL BORRELLI, *et al.*,

Petitioners,

v.

THE SECRETARY OF TREASURY, THE COMMISSIONER OF THE INTERNAL REVENUE, THE NEW YORK CITY EMPLOYEES RETIREMENT SYSTEM, THE NEW YORK CITY POLICE PENSION FUND, THE FIRE DEPARTMENT PENSION FUND, MARTHA E. STARK, WILLIAM C. THOMPSON, JR., BETSY GOTBAUM, C. VIRGINIA FIELDS, MARTY MARKOWITZ, ADOLFO CARRION, JR., HELEN MARSHALL, JAMES MOLINARO, LILLIAN ROBERTS, ROGER TOUSSAINT, CARROLL HAYNES, JOHN J. MURPHY, MICHAEL R. BLOOMBERG, RAYMOND W. KELLY, PATRICK J. LYNCH, JOHN PUGLISSI, MUBARAK ABDUL-JABAR, SCOTT WILLIAMSON, THOMAS SCOTTO, EDWARD MULLINS, ANTHONY GARVEY, JOHN DRISCOLL, STEPHEN CASSIDY, JAMES SLEVIN, KEVIN MCADAMS, ROBERT STRAUB, PETER GORMAN, NICHOLAS VISCONTI, STEPHEN CARBONE, ANTHONY CROWELL, DIANE BRATHER, HORACIO SPARKS, MYLAN DENERSTEIN and THE CITY OF NEW YORK,

Respondents.

On Petition For A Writ of Certiorari
To The Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

Kevin Fitzpatrick
MARSCHHAUSEN & FITZPATRICK, P.C.
Attorneys for Petitioner
500 [illegible]d Country Road
Garden City, New York 11530
516-877-7700

QUESTIONS PRESENTED

The Second Circuit affirmed the district court's decision to dismiss the claim of over 2,500 municipal retirees against the Internal Revenue Service ("IRS") and their employer for lack of subject matter jurisdiction. The claim seeks review under the Administrative Procedures Act ("APA"), 5 U.S.C. § 701 *et seq.*, of the Internal Revenue Service's ("IRS") determination to allow three municipal pension funds to maintain tax exempt status, notwithstanding that each of said plans has illegally diverted billions of dollars of corpus of the underfunded pension systems for non-pension purposes, is continuing to divert these assets, and notwithstanding that the IRS reached a determination that at least one of the diversions violated the penultimate requirement for tax-exempt status, the exclusive benefit rule of the Internal Revenue Code ("Code"), 26 U.S.C. § 401. In holding that the APA did not apply, the Second Circuit's decision directly conflicts with the plain language of the statute and three separate holdings of this Supreme Court of the United States.

Three questions are presented:

1. Is tax exemption established by mandatory language in the Code which sets forth the requirements for tax exemption or the absolute discretion of the IRS?

2. Does Code §§ 401, 501 and 503 provide "law to apply" for APA purposes and, thus review of the IRS's determination of a pension funds entitlement to tax exempt status, where the express language of the Code provides that a fund "*shall*" be tax-exempt "*if it is impossible*" for corpus or income to be diverted, or alternatively, that a fund "*shall not be exempt* from taxation . . . *if it has* engaged in a prohibited transaction?"

3. Is it 'arbitrary, capricious or an abuse of discretion' when the IRS permits a plan to maintain tax exempt status even though it does not meet the requirements for tax exemption because it routinely engages in the illegal diversion of assets to non-pension funds?

LIST OF PARTIES

The parties are listed in the caption and as set forth below.

The petitioners are, as follows:

PETER J ABBOTT, EMAMUEL ABRAMOWITZ, JACOB H ABRAMSON, JAMES J ACCORDINO, JAMES ADAMS, RICHARD ADLER, FREDERICK J ADRIO, JOHN AGNELLI, WILLIAM AHRENDT, CLESTINE ALAN, EMANUEL ALAYON, HENRY J. ALBRECHT, JOSEPH A. ALENSKI, DOMINICK J ALTIERI, ALEXANDER S AMADEO, JOHN T. ANDERSON, CHARLES P ANDERSON, JAMES ANDRADE, STANLEY M. ANDRON, NICHOLAS V ANGELASTRO, JOSEPH A. ANGELINI, JAMES ANGELINO, NELSON APONTE, DONNA ARAKEL, ROBERT ARAKEL, GEORGE E ARMSTRONG, JAMES ARMSTRONG, PETER A. ARTESONA, GEORGE ASTARITA, SALVATORE AUGERI, JOHN AURICCHIO, JOSEPH J. AUTERA, EDWARD J. AVILES, WILLIAM BADALA, ARTHUR D. BADCOCK, JOHN J. BAEZA, GEORGE BAKICH, DONINICK R BALDUCCI, DAVID B BALLANTINE, CHARLES BALLOU, FRANCIS BALUCK, ARNOLD BANKS, WALTER C. BANSLEY, ARMANDO BAQUERO, DANIEL E BARBARO, EDWARD P. BARKER, HARRY J. BARKLEY JR., ERNEST BARON, ALVIN BARRETT, ALEX BARTELL, BRUCE BARTOLOMO H, DENNIS C BARVELS, PHILIP A BASILICE, JOSEPH A. BAUSANO, RICHARD A. BAYER, FREDERICK P BAYER, PETER A BAZANAS, ROBERT BECKER, THOMAS J. BEGY, FREDERICK BEINER, REGINAL BELGRAVE, ROSARIO R BELLIE, LORENZO J. BENENATI, JOSEPH M BERENHAUS, GEORGE A BERGER, MAX R BERGER, RONALD H BERGER, DONALD R BERGERON, VICTOR BERGMAN, CARL D. BERGSTORM, EDWARD J. BERTRON, PHILIP BERZANSKY, WILLIAM B BESSMAN, WILLIAM D BETT, SPERO BETTALICO, HAROLD E. BETZLER, ANGELO BEVILAQUA, ALEXANDER BIAMONTE JR, THOMAS J BIANCHI, DONALD J. BIANCO, ROBERT BIJESSE, LEROY BINES, SAMUEL BLOCK, KENNETH F BLUMEK, SIDNEY

BLUMENFELD, FRANK BOCCIO, RALPH BOFSHEYER, SHERWIN BOGART, SALVATORE G. BOLOGNA, MICHAEL J BORRELLI, JAMES J. BOYLAN, ROBERT J BRANDT, JOHN P BRANIGAN, MARY H. BRAUN, PARTICK F. BREEN, MICHAEL A. BREHENY, JAMES BRENNEISEN, SAM BRESS, RICHARD J BRINKMAN, THOMAS J. BRODERICK, ROBERT J. BROOKS, ROBERT D BROWN, THOMAS BROWN, EUGENE F BROWNE, THOMAS S BRUNETTI, FREDERICK F. BRUNHUBER, GASPER A. BUA, JOHN S. BUCKLEY, ELIDA BUCKLEY, FRANCIS P. BUNTING, FRANK BUONO, JOHN T. BURCHER, MICHAEL J. BURKE, HUBERT BURKETT, EUGENE BUTKEVICH, WILLIAM F BUTTERWORTH, JAMES BUTTON, JOHN R. BYRNES, JOSEPH CALDARERA, JOE CALDERARO, CHARLES CALLAHAN, EDWARD J. CALLIGAN, COOPER CAMP, ANTHONY J CAMPANELLA JR, VINCENT F. CAMPBELL, MILTON CAMPIS, VINCENT M. CANGELOSE, WILLIAM CANNON, JOHN CAPAROSA, FRANCESCO S CARINO, PETER S CARINO, JOHN G CARINO JR, BILL CARLE, ROBERT J CARLTON, WILLIAM CARNEVALE, EDWARD CARO, RICHARD J. CARROLL, MICHAEL J. CARROLL, FRANK CARSON, JAMES J. CARVINO, ALBERT CASALE, PETER CASALE, FRED J CASEY, THOMAS J. CASSIDY, WILLIAM CASSINELLI, ROBERT M. CATALANO, RAY CECORA, PHILIP CERBINI, ARTHUR CESARE, ROBERT V CHECCO, ANGELO CHIAPPERINO, JOHN A CHIARELLO, THOMAS CHRISTIAN, EMANUEL CHRISTIANO, DUNCAN A CHRISTIE, DONALD CHURA, DENNIS CLANCY, HOBIE CLARK, GROVER J. CLEVELAND, ROBERT P. COCHRANE, JOHN J. CODY, JOSEPH P. CODY, JAMES W. CODY, GERALD R COFFMAN, IRVING COHEN, MORTIMER B COHEN, ROBERT D COHEN, STANLEY COHEN, WILLIAM J COLEMAN, RAMON COLLAZO, PHILIP F COLLETTA, ISRAEL L. COLON, ANDREW COLUMBIA, JOHN S COLUMBIA, PHILIP COLUMBIA, ROBERT COLUMBIA, CARL J COLUMBIA, JOHN J. COMISKEY, WILLIAM T. CONDON, JOHN P. CONNOLLY, WILLIAM J CONNOLLY,

EDWARD A CONROY, RICHARD COOK, EDWIN B. COOPER, JOSEPH COOPER, JOHN A. CORBO, ALFRED A. CORDOVA, BURTON COREEN, ED CORONATO, JOHN P. CORSELLO, JOHN A. CORTAZZO, ED COTTER, PASQUALE COTUGNO, JAMES A COX, FRANCIS J COYNE, JAMES O CRAWFORD, WILLIAM T CREELMAN, PEDRO R. CRESCENTE, CARMINE A CROCE, WILBERT CROCKETT, MARTIN H. CROOM, WILLIAM T. CROWLEY, FRANCIS A. CROWLEY, PATRICK CROWLEY, EUGENE T CULLIGAN, DAVID CUNNINGHAM, WILLIAM A CUNNINGHAM JR, VINCENT J. CURRERI, HARRY G CUSTER, JOHN CUTIE, JAY CYTRYN, GORDON DALE, FRANK DALTON, JOSEPH W DALY, FRANKLIN J DAMIANA, RONALD R DAMSKY, TIMOTHY F DANAHER, SIDNEY DANIELS, JOHN A DARRAUGH, ROBERT W. D'AURIA, WILLIAM E. DAVIS, JOSEPH DE LOOSE, JOSEPH F. DECICCO, CARLOS F. DEGARCIA, VINCENT DEL BASSO, EDWARD A DEL PRETE, JAMES DEL VALLE, JOSEPH D DELFINO, JOSEPH DELGADO, CHRIS A DELIA, JOSEPH A. DELUCA, THOMAS G DEMANGE, THOMAS DEMARCHI, ANTONIO DEMARZO, WILLIAM DERASMO, LOUIS R. DESALVIA, GEORGE DESALVIA, HERMAN DESATNICK, RICHARD A DESIMONE, NICHOLAS M. DEVITO, DOMENICK M DEVITO, SALVATORE DEVITO, LEONARD DI CRISTINO, PHILLIP DI GENNARO SR, FRANK W DIACO, RAFAEL DIAZ, LOUIS M DIAZ, WILLIAM DIDWAY, DOMINICK E. DIFIGLIA, JOSEPH S DIGREGORIO, GEORGE E. DILLON, JOHNNY J. DIMASSO, JAMES DIMINO, LAWRENCE DITUSA, JOHN W DIXON, LOUIS DODARO, JOHN J DOHERTY, BERNARD A. DOLAN, JOHN A DONDIEGO, PAUL A. DONNELLY JR., WILLAIM J. DONOVAN, JOHN P. DONOVAN, VINCENT P. DOOLEY, JOSEPH DORILIS, MICHAEL DOUGHERTY, WAYNE J. DOYLE, MARTIN DOYLE, HENRY B. DRAGONETTI, JACK DRESCHER, HARRY DRESNER, MICHAEL J DREYER, RICHARD DUGGAN, NARDIN H. DUNCAN, WILLIAM J. DURAND, HER-

BERT EDGAR, DENNIS M. EDMONDS, MANNING EDMONDS, KEN EGAN, LANCE EISINGER, JOHN J. ELLIOT, FRED EMERT, FRANK J ENTEL, GEORGE EPSTEIN, JOHN ERICKSON, ROBERT J ESPOSITO, CHARLES M. ESTWICK, THOMAS J. EUELL, JAMES T. EULIE, ROBERT K EUSTACE, SABASTIAN FAILLA, JAMES FAIRCHILD, FRANCIS E. FAIVRE, EDWARD FALLON, THEODORE FARACE, ANTHONY FARINA, EDWARD T FARNAN, JOHN T. FARRELL, WILLIAM E FARRELL, MICHAEL FAUGHNAN, DANIEL FAVA, CHARLES A FAZIO, OTTAVIO FAZIO, ROBERT C. FEDERICI, HENRY J FEHLING, JOSEPH FEIGNBAUM, STEVEN FEIGOFSKY, HECTOR FELICIANO, STEPHEN FELSEN, STANLEY S. FERBER, ANDREW M FERRANTE, VERNON FEURTADO, ALVIN FIELDS, RUEBEN FIER, DONONICK FILIPPONI, VINCENT P FINEO, MARY T FINIZIO, MARTIN H FINKELSTEIN, EDWARD FINNERTY, EUGENE E. FINNIN, ANTHONY T. FIORELLO, JOSEPH C FIRTH, WILLIAM J. FITZPATRICK, JAMES J FITZPATRICK, DONALD W FITZSIMMONS, ANDY J FLOCK, EDWARD H. FLOOD, RALPH T FLORIO, ANTHONY P. FLYNN, JOSEPH P FLYNN, ROGER FLYNN, MARSHALL FOOTE, JOHN D FORGET, WILFRED H FORTIN, THEODORE FOSCOLO, ROBERT A. FOX, GEORGE FRANGOS, EDWARD J. FRAWLEY, HANS H. FREDERICKS, WILLIAM R FRIEND, BENJAMIN F FRIES, MILTON FRISCK, LEONARD FRUMIN, MICHAEL V. FUFIDIO, PATRICK FUREY, TIMOTHY M. FUSCO, DOMINIC J. GAETA, WILLIAM GAGLIARDO, JOSEPH GAGLIARDO, JOSEPH J. GALHAUS, VINCENT GALLAGHER, JAMES J. GALLAGHER, JAMES A. GALLAGHER, WILLIAM P GALLAGHER, JAMES F. GALLIANO, GEORGE GARCIA, ANTHONY E GARGIULO, IVAN GAUNILL, LOUIS GEGRETO, PAUL R GEHRING, SAM GELBER, ERIC J. GELBMAN, CAREY G GELFAND, ANTHONY F GENDUSO, JOSEPH M GERVASI, WILLIAM J GESSMER, FRANK GIACONELLI, JOHN R GIANNATASIO, OSWALD GIBBONS, JOSEPH M. GIBNEY, DAVID S

GINSBERG, KENNETH GIUNTA, JOSEPH L. GLOSS JR., JIMMIE L. GLOVER, JOHN GLUCH, SIDNEY GLUGOVER, WALTER GODFREY, SYLVIA GOFFIN, SEYMOUR GOLDBERG, BERNARD GOLDMAN, ANNETTE GOLDSTEIN, STANLEY GOLDSTEIN, LOUISE L GOMEZ, PHILIP P GOODWIN, ISIDORE GOTTLIEB, ROBERT GRANDT, RICHARD GRANDT, JAMES GRAVANTE, HOWARD A. GRAVES, BURTON GREEN, JONATHAN F GREENBERG, ROBERT G GREENE, THOMAS F GREENE, JACOB GREENSTEIN, SAM GRIBBEEN, FRANCES GRIEFENBERGER, NOEL F GRILLO, AURELIO V GRILLO JR, AURELIO V. GRILLO JR., RAYMOND GROLL, EDWARD F GROSS, AARON T GROSSMAN, KENNETH R GROSSMAN, ANTHONY GUARRIELLO, GEORGE L GUCK, ANGELO J. GUGLIELMONI, ANGUS GUNN, BARNETT GUTHARTZ, ARTHUR HABER, EDWARD G. HAGENBRUCH, JOHN HAHNENBERGER, RAYMOND D. HALL, GEORGE J. HALLER, STEPHEN P. HALLORAN, FRANCIS HANRATTY, HELENE HARDICK, RICHARD J HARTMANN, ROBERT HARTNER, JEROME HARVEY, LESLIE J HARVEY, FREDRICK J. HASS, JOSEPH HASSON, HARRY M HAUPTMAN, CAROL L.HEALY, GARY HEIL, CHARLES HENRY, GILBERT A HENRY, HENRY J HENSCH, HARVEY L HERMAN, LUIS M. HERNANDEZ, VICTOR HERSHKOWITZ, WALTER HICKEY, RAY HICKEY, LAWRENCE HILL, CARL W HIRSCH, ALBERT HOFFMAN, ANDREW J HOGAN, FRANCIS X HOGAN, GERARD H HOLLERAN, JAMES J HOLLYWOOD, EDWARD A HOPKE, DANIEL P HOROWITZ, HARRY HORTON JR, EDWARD HORVATH, JUNE HORVATH, HORVATH, WILLIAM J HOSFORD, WALTER HOULIHAN, ROBERT HOWARD, DONALD HOWE, FREDERICK G HUBER, MIKE HUDOR, GEORGE P. HUGHES, JOSEPH HUNT, HUBERT G HUNTE, ALFRED J HUNTER, GEORGE IAPEZZUTO, PETER J INCLEDON, JOSEPH INGRISANI, CHARLES INTERDONATO, CARMINE M. IORIO, JAY ISAACOFF, WILLIAM ISHMAN, MAURICE ISRAEL, THOMAS D. JACOBELLIS, CHARLES L JACOBI,

ALFRED JACOBS, BERNARD M JACOBS, QUENTIN O JACOBS, ROBERT E. JANTZ, ANTHONY JENKINS, MELVIN L JENKINS, NIRMILLA JITTA, EDWARD JOHNSON, THEODORE JOHNSON, JOHN P JOHNSON, JOHN W JOHNSON, JOSEPH JOHNSON, GEORGE J. JOHNSTON, LAWRENCE JONES, WILLIAM T JONES, MICHAEL W JOST, WALTER JOST, JOHN J JOYCE, THOMAS JOYCE, VINCENT W JULIUS, JOHN JUST JR, JOHN JUST JR., LOUIS KADIN, JOHN KAESER, KENNETH M KAFMAN, WILLIAM H KALLETTA, DONALD KAMINSKI, ALEXANDER KAMINSKI, ROBERT E KANE, RITA KAPLOWITZ, BRUCE H KARP, LEO KASSABIAN, RUBIN KASTEN, RICHARD E KAUFOLD, RONALD J KAVANAGH, KENNETH F KEEFE, CHARLES J KEELING, MARY A. KEENAN, BILL KELLER, HOWARD KELLY, JOHN P. KELLY, BILL F KELLY, WILLIAM J KELLY, JAMES B. KENNEDY, JEREMIAH P. KENNEDY, TIMOTHY R KENNEDY, SAMUEL J KENNISON, JAMES J. KENNY, GERALD R. KENNY, JOHN J. KERYC, STUART L. KESSLER, CLINTON C. KESSLER, IRVING KEST, RUSSEL H. KEULING, CHRISTOPHER A KIERNAN, MADELINE R KIGGINS, RONALD J. KING, EUGENE J. KING, THOMAS M KING, RICHARD W KIRRSTETTER, JACOB KLEIN, MICHAEL KLEIN, KENNETH R. KLEINLEIN, KENNETH J KLINKENBERG, WILLIAM H KLINKENBERG, ROBERT KLOTZSCHE, GEORGE KNATZ, RICHMOND KNIGHT, IRVING KOLODNY, EDWARD H. KONCHAN, MITCHELL KORNFELD, SAM KORNFELD, JOHN P. KORTH, EDMUND J KOSINSKI, DAVID M. KOSTER JR., SOLOMON KOTEL, LEON KRAUSS, WARREN JC KRIES JR., JOSEPH T KUBINSKI, JOHN J. KUCHMA SR., RICHARD KURTZ, PAUL KUVEIKIS, JOHN H. KUVEKE, RICHARD KVIES, TRACY KVIES, JOSEPH P LA MONICA, ALVIN LABRYS, JOHN P. LACHMAN, GEORGE LAHM, EDWARD T LAMADORE, JOHN LAMONT, BERNARD LANDAU, JOSEPH W LANDERS, DONATO G LANDI, EUGENE LANG, HENRIETTA LANGE, RICHARD A LAPP, LUCIANO LAROCCA, WILLIAM C

LATHER, JACK LATONA, EMILE LAURINO, LOUIS LAVARO, THOMAS M. LAWLOR, STEVEN E LAWRENCE, FREDERICK R. LAYNE, BRIAN A. LAYNE, ANTHONY LAZZARO, JOHN P. LEAVY, EDWARD LEBOWITZ, LOUIS LEBRON, LAWRENCE LEFTKOWITZ, JACK D. LENT, DONALD R LEO, JOSEPH V LEONCAVALLO, ROBERT LEROUX, LEONARD LETIZIA, ROBERT C. LEUPP, HARRY LEVINE, EDWARD LIEBES, KENNETH R LINDBERGH, THOMAS J LISTON, RONALD B. LOCKWOOD, KENNETH LOFARO, CONRAD LOFARO, DONALD A. LOGER, THOMAS J LONERGAN, CLIFFORD W LONG, THOMAS LONG, NANCY LONG CRESPO, EUGENE J LOONEY, ALBERT C. LORENZ, JOSEPH W LOUGHRAN, DAVID LU QUIS, FREDERICK J. LUHMANN, STEPHEN J LUONGO, VINCENT J LUPO, THOMAS D. LYDON, DENNIS J LYDTING, RICHARD P. LYNCH, STEVEN MACK, ROBERT MACKLE, PETER MADOR, MICHAEL MAGGIACOMO, ANTHONY M MAGGIO, JOSEPH J. MAGINNIS, JAMES J. MAGUIRE, MICHAEL H MAHANEY, JAMES V. MAHER, THOMAS J MAHER, MICHAEL MAHONEY, TIMOTHY F. MAHONEY, JOSEPH MAIER, JOSEPH F MAIMONE, WILLIAM MAJESKI, ROBERT L MAJOR, EDWARD MALLOY, CHARLES A MALONE, PETER J. MALONEY, JOHN J MALONEY, PHILIP J MANDZIK, FRANK D. MANNING, JOHN B MANNION, GEORGE J MANTELL, JOSEPH MARCIGIANO, RICHARD E. MARCY SR., STANLEY H MARGOLIN, ALFRED R MARINO, PHILIP MARKEY, THOMAS MARKS, WILLIAM MARKS, FRANK V MARLOW, TONY MARONE, LAWRENCE J. MARREN, WARREN R. MARSCHAT, GEORGE MARSCHHAUER, JOHN J. MARTIN, WILLIAM R. MARTINEZ, JOSEPH MARTUCCI, ANDREW MATEJICK, FERDINAND J. MATERA, NICK MATTERA, WILLIAM F. MAUGHAN, JACQUES MAURICE, EDWARD G MAXWELL, THOMAS MAYER, THOMAS G MCANDREWS, FERGUS J MCAPPLE, ROY MCBEAN, DENNIS J. MCCABE, ULTAN P. MCCABE, JOHN F MCCARRY, GEORGE S MCCLANCY,

WILLIAM T. MCCLELLAN, JOHN A. MCCORMACK, DENNIS MCCORMACK, PATRICK MCCREESH, JOHN P MCDERMOTT, DAVID MCDONALD, FRANCIS A. MCDONALD, JOHN J MCDONALD, THOMAS MCGARRY, JAMES MCGINNIS, JAMES J MCGOVERN, KEVIN MCGOVERN, PATRICK J MCGOVERN, JOHN P MCGRATH, MICHAEL E MCGRATH, THOMAS J MCGRORTY, JAMES E. MCGUINNESS, ROBERT F. MCGUIRE, RANDOLPH H. MCKEE, BERNARD S MCKIE, WILLIAM MCLAREN, WILLIAM H MCLIVERY, JAMES M. MCMAHON, DENNIS MCMAHON, JOSEPH P. MCMARROW, THOMAS MCNEILL, ARTHUR MCNEVIN, OWEN MCVEIGH, ARTHUR G MEENAGH, ROBERT MEILER, JOSEPH J. MELITO, ANDREW H MENDITTO JR, H. ROBERT MENGEL, LAWRENCE MENNITI, DENNIS MENSCH, DONALD M MESELSOHN, ANTHONY MESSINA, WILLIAM MESSINA, HOWARD MESSING, FRANK MEYER, CLEMENT M MIECZKOWSKI, NICHOLAS C. MIELE, JOSEPH J. MILAZZO, KENNETH H MILDWORM, THOMAS MILLER, DONALD L MILLER, CHARLES J. MILLER JR., GERALD MILOSCIA, JOHN R. MISSION, SHELDON R MOLDEN, EDWARD MOLLER, JAMES MONAHAN, EUGENE R MONAHAN, JOSEPH MONTALI, JOSEPH C. MONTELEONE, JAMES F. MOONEY, MICHAEL K MOONEY, WILLIAM J MOORE, JAMES J. MORAN, GEORGE J MORAN, JAMES P. MORGAN, PATRICK J. MORIARTY, JOHN B. MORRIS, VINCENT MORRIS, STANLEY MORSE, EDWARD J MORSE, JOHN A MOSCHELLA, WOODROW MOST, LYNN M MOUND-DIESEL, GEORGE MOURLOT, PATRICK M. MOYNIHAN, ROBERT G. MUCIA, JOHN G MULLANE, FRANK MULLEADY, MATTHEW J. MULLEN, ROBERT MULLIN, GEORGE J MULLINS, LEO J. MULVIHILL, MARTIN J. MURPHY, PAUL A. MURPHY, PAUL MURPHY, ANDREW J MURRAY, EDWARD MURRAY, CARLO S MUSCARELLO, HUBERT MUSCHETT, RICHARD MUSCO, WILLIAM A. NAVARRA, WILLIAM M NEADLE, CORNELIUS F NEENAN, JOSEPH T NERO, LAWRENCE

NICHOLAS, BEN NICOLOSI, RAYMOND M NODELL, GOERGE P NOLAN, ANGELO NORBERTO, GEORGE NORDT, LESLIE NORR, ROBERT NOTHOLT, JOHN W NULTY, FREDERIC R OBARSKI, WILBER OBERG, JOHN F O'BRIEN, KENNETH E O'BRIEN, RICHARD J O'BRIEN, CHARLES J. O'CONNELL, THOMAS J. O'CONNELL, NEIL P. O'CONNOR, RAYMOND P O'CONNOR, THOMAS K O'DONNEL, MARTIN O'DRISCOLL, JOHN O'GRADY, JOHN P. O'HALLORAN, THOMAS O'HEHIR, HARRY OHNIGIAN, JESSE M OLDSHEIN, JAMES S. OLEKSA, RICHARD OLIVA, RICHARD F OLKEY, PATRICK J. O'MALLEY, FRANK J OREFICE, MARK OREFICE, DANIEL O'REILLY, SIMON ORENSTEIN, GARRETT O'ROURKE, EDWARD ORZECH, RICHARD S ORZECH, ALAN R. OSTOITS, WARREN OSTROFSKY, JOHN O'SULLIVAN, PETER J. O'TOOLE, PATRICK M O'TOOLE, LOUIS R. OTTEN, WAYNE T. OXLEY, RAEFFELE M. PADUANO, RICHARD A. PAGANO, JOSEPH J. PAGANO, NICHOLAS PALAZZO, EVERETT PALMER, GARY PALMESE, ROCCO R PANETTA, ANDREW J PANICO, RALPH PANICO, DANIEL A PANTANO, VINCENT P PANZARINO, JOHN PARISI, LOUIS PATRONE, RICHARD PAUL, JAMES PEACE, VINCENT V. PECORELLA, RAYMOND G PEGLOW, GERALD T. PEITLER, EUGENE R PELKER, AGENOL PELLOT, EMMY L. PENA, VINCENT E PEPPARD, JOSEPH A. PERAGINE, JOHN PEREZ, RAYMOND PEREZ, STANLEY PERLMUTTER, HARVEY PERLSTEIN, JOSEPH PERRATTO, JAMES PERRETTO, CARMINE PESTANA, JAMES J. PETERSON, DORIS E PETERSON, RICHARD PETRONE, CURTIS PETTAWAY, JOHN G. PHILIE, RICHARD PHILLIPS, RICHARD E. PILNY, THOMAS PILOTTI, FRANK J PIRO, STANFORD H PLANTY, JEROME P. PLESCIA, KLAUS D POSSELT, GORDON K POULSEN, ROBERT POWELL, RICHARD P. PRA, THOMAS C PUGLISI, BENNIE PULICE, CHARLES G. PUSEY JR., LOUIS RAIFORD, WILLIAM J. RALPH, THOMAS T. RAMOS, BENJAMIN T RANDAZZO, FRED RAO, ERNEST C RAPACCIUOLO, JEROME

RAPISARDI, PAUL J REDECHA, CLAUDE REDWOOD, JOHN REEKIE, MURRY REFFSIN, LOUIS H REICH, THOMAS REICHLING, JOHN J REILLY, ROBERT E REILLY, HENRY D. REISS, HENRY REITER, EDWARD P. REMAVICH, FRED E. RENO, JOHN A. RENZI, PAUL RICCA, EDWARD C RICHTER, MICHAEL S RICHTER, THOMAS M. RIDGE, EDWARD A. RIFFONE, FRANK RINALDI, ANTHONY RING, DANIEL H RISPOLI, ANTHONY RIVERA, THOMAS P. ROBB, MANUEL RODRIGUEZ, JOSE RODRIQUEZ, JOHN J ROGALA, THOMAS A. ROGERS, JOHN W ROGERS, MARY JANE ROGERS, RICHARD P ROGERS, ROBERT T ROGERS, MARVIN M ROGOFF, JOHN RONAN, VINCENT A. ROSE, PHILIP E. ROSE, MICHAEL ROSENBLUTH, PETER ROSSI, ABBY ROTH, STUART ROTHBAUM, HAROLD ROTHE, IRVING ROTHMAN, THEODORE ROTHSCHILD, JORGE L RUBERO, NEIL RUBIN, NICHOLAS J. RUBOLINO, MARILYN RUDERMAN, JOSEPH A RUGGIERO, SERGE RUGGIO, ROBERT D RUSSELL, FRANK RUTZINGER, WILLIAM J RYAN JR, RAYMOND P SABEL, FRANK B SACLAYAN, STEVE SADLER, ANDREW SALERNO, JAMES A. SALVI, ARNOLD SALZBERG, FRANK J SAMUELS, JOSE L. SANCHEZ, DANIEL F SANTA LUCIA, DOMINICK SANTA MARIA, ANTHONY SANTAROMITA, FELIX E SANTOS, RICHARD A SASSO, JOSEPH SASSONE, MICHAEL T. SAVAGE, ROBERT S SCALONE, EDWARD SCARANO, DAVID SCARANTINO, WILLIAM M. SCHACHTEL, LUDWIG SCHILLING, FRANKLIN E SCHIMEK, LANNY SCHIRTZER, LOUIS SCHLIFSTEIN, JOHN W SCHMIDT, ROBERT J. SCHMITT, RAYMOND SCHNYDERITE, LOUIS J SCHOBEL, HAN-JURGEN SCHOENEBECK, THEODORE P SCHONHANS JR, THEODORE P. SCHONHANS JR., ROBYN SCHONHANS/CHAKWIN, GEORGE R SCHRECK, JOHN SCHUESSLER, FREDERICK C SCHULTHEIS, DONALD R. SCHULTZ, GERALD E. SCHULTZ, GEORGE A SCHUMACHER, LOUIS SCHWARTZ, JOSEPH A SCIABICA, PHILIP SCICOLONE, JOSEPH H SCIMECA SR, ANTHONY SCLAFANI,

KEVIN SCOTT, JAMES E SCOTT, ALBERT SEEDMAN, DAVE SEGAL, LOUIS SEGRETO, EDWARD T. SEIFRIED, CARL J. SERPE, MELVIN SHAPIRO, JOHN W. SHARKEY, JAMES F. SHEEHAN, DONALD SHEPARD, THEODORE SHEPPERSON, AARON SHERRIN, LEONARD SHNIPER, STANLEY SILVERMAN, ALEXANDER SILVERSTEIN, ROBERT SINDONE, RONALD SINGER, JOHN J. SKALA, SEYMOUR SKOLNICK, EDWARD SKRZYPEK, RONALD A. SMITH, DONALD V. SMITH, GEORGE C. SMITH, SAM SMOLENSKY, JOHN F. SNYDER, JOHN B SOCHACKI, SAL SOLDANO, FREDRIC M. SOLOMON, HARRY SOLOWSKY, LOUIS SOMMELLA, RICHARD J SORGE, DIANA M. SOTO, ROBERT SOTOMAYOR, CHARLES V SPARROCK, RONALD SPEAKER, ALFRED SPECIALE, ANDREW SPIELER, DONALD SPININGER, GEORGE H. SPRINGER, GILBERT STARKEY, CHARLES W STAUDENMAIER, HUGH P STEEN, TOBIAS STEGMAN, HOWARD J STEIN, ROBERT G STEIN, RONALD STEINBACH, JACK STEINBURG T, ALVIN R STEINER, JOHN STEINHEIMER, LAWRENCE STELLER, GERALD M. STELZER, ROLAND STEPHENS, ISADORE S STERLING, VALENTINE J. STEWART, JOHN STEWART, TIMOTHY STEWART, PAUL STISO, RICHARD STRAMKA, ALBERT STRAUSS, EDMUND A STRONG, CARLOS SUAREZ, LEO SUAREZ, EDWARD M. SULLIVAN, EDWARD SULLIVAN, ED SULLIVAN, JAMES T SULLIVAN, TIMOTHY F. SULLIVAR, JOHN SULSER, GERARD F SWEENEY, GEORGE SYMAN, FRANK SZCZERBICKI, BERNARD TABAKMAN, TONI TANCORA, PETER TAORMINA, TEDDY TARGONSKI, STEPHEN TATE, FRED J TAYLOR, EDMUND TERZO, IRVING THEODORE, EDWARD A TILL, THOMAS S TODARO, THOMAS J TOMLINSON, FRANCIS A TOOLEY, GREGORY TORRES, ALEXANDER TORRES, PHILIP TORRES, JOSEPH TOTO, JOHN TRALONGO, ANTHONY P TRAMUTA, JOHN W TRAUTMAN, RAYMOND J TREUBERT, VINCENT A TRIA, PETER TRIMBOLI, EDWARD E TRIMBOLI, THOMAS V TROISI, NORTON TUBER-

MAN, WILLIAM A TURSELLINO, VITO M. TURSI, IRWIN VALE, JAMES A VALENTI, ANTHONY VALLICENTI, WILLIAM D VANCE, TIMOTHY VANSCHULTZ, BERNARD J VARSKA, ANTHONY VASQUEZ, ANTHONY A VECCHI, ANGEL M. VEGA, CHARLES VEGA, BRUCE L. VEGODA, JOSEPH VENTO, MARTY VERDI, KENNETH R VICKERS, HUGO VICONTI, JOHN VILCHES, JOHN VILLANO, JUAN A. VILLANUEVA, JOSEPH V VIOLA, MICHAEL VISCONTI JR, MURRY VNETZKY, ROBERT VOGEL, WILLIAM R VOLPE, CHARLES D VORRACH, DAVID P WAGNER, HERBERT WAGNER, WILLIAM WAHL, RICHARD A WALIGOVSKA, JAMES C. WALKER, STEPHEN WALL, JAMES C WALLACE, WILLAIM J WALSH, FRANK WALUK, GARRETT J WARD, HERMAN F WARNKE, DONALD J. WAUGH, MEL WAXMAN, RICHARD W. WEBB, HOWARD WEBER, EDWARD P. WEDELSTAEDT, ALFERD C. WEINHAUER, PAUL M WEINMAN, ALAN WEINSTEIN, STUART WEISBAUM, GEORGE WEISBECKER, DONALD WEITZ, JAMES L. WEPPLER, RICHARD J WESTBY, STEVE WHALEN, FRANCIS J. WHELAN, JOSEPH A. WHITE, DAN WHITLEY, EDWIN C WHITTALL, WILLIAM M WILKEYSON, FREDERICK WILLMOT, ROBERT WINSLOW, STANLEY A. WISHIN, CHARLES WITCOSKI JR, MARK WOHL, JAN H WOLF, MARC D WOLF, CEDRIC WOLFMAN, DON WOODS, EDMOND P WOODS, JOHN T. WORTH, EDWARD J.WRIGHT, EDWARD A. WRIGHT, ARTHUR G WRIGHT, BERNARD S WROBLEWSKI, WALTER W WUNDERLICH, THOMAS N YACCA, RICHARD J. YOUNG, THOMAS ZACCONE, THOMAS P ZAMBRANO, JIM ZARB, JULIUS ZARETSKY, EDWARD ZAWASKY, FRANK ZECCA, FICTICIOUS ZEON, FICTICIOUS ZEONA, FICTICIOUS ZEONI, RUDOLPH J. ZIEGLER, JOHN ZUNIGA, NATALE ABRUZZO, NEIL ALEXANDER, FREDDIE ALLEN, MANNY ALVELO, LILLIE ANDERSON, ANTHONY ANNALORA, THOMAS ANNALORA, ANDREW ANTLEY, THOMAS ARENA, ANTHONY ARFI, JOSEPH ATTARDO, ERNEST

Attianese, Gregory Avery, Edward Baker, Ronald Bamberger, Frederick, Barber, Joseph Barile, Arthur Barnes, Richard Bartha, Thomas Bartolotta, Robert Barton, Ralph Bastion, Barbara Beasley, Raymond Behan, Richard Bible, Patrick Bifone, Justin Billings, Robert Boddie, Peter Bonanno, Joseph Borg, Margaret Bracco, Paul Brady, James Brennan, Michael Brennan, Peter Brennan, Alvin Brice, Christopher Brogna, Samuel Brown, Fred Brown, Willie Brown, Robert Bruno, Thomas Buoneto, Harold Burgher, Jerry Burke, Ranyd Burke, Joseph Bussetti, Gerald Buzzerio, James Bynes, Rafael Caban, Kevin Calabrese, Roy Caldwood, Micheal Cantwell, Gerard Capobianco, Joseph Capone, Vincent Carrara, Louis Carrington, James Carsten, David Carter, Bernard Cassidy, Frank Castranova, Daniel Caudiano, Anthony Ceretti, Thomas Charles, Peter Cilione, Arthur Cinotti, John Ciraolo, John W. Clarke, John Clark, John Clidas, Frank Colavito, Eisenhower Coleman, Michael Colletti, Saverio Colletti, James Collins, Frank Conforti, Authur Connors, Edward Correa, John Crandall, John Cuhaj, Timothy Curtin, Gasper D'Amico, James Davis, Neil DeCanditis, Micheal DeCicco, Frank DeCola, Michael DeCola, Authur DeConinck, Clifford DeCreny, Leonard DeCrescenzo, David DeFazio, Dominic DeFilippis, Richard Delia, Eric DeRavin, Pasquale DeSimone, Dominick DiLorenzo, John DiMasso, Richard DiNapoli, Anthony DiRusso, Sarah Dixon, Francis Dolan, Desmond Donaldson, John Donovan, William Donovan, James Dowdy, Eugene Duca, Leroy Duncan, Kathleen Dunn, John Durso, John Elliott, John Ellis, Alan Epple, Benson Epstein, Donald Evans, Jerome Fant, Johnathan Farah, Leonard Farber,

ARTHUR FELLIN, ALBERT FERRI, JAMES FINELY, RAYMOND FIORE, WALTER FIREHOCK, ROBERT FITZGERALD, EUGENE FITZPATRICK, THOMAS FLAIM, MICHAEL FROST, JAMES GALLAGHER, JOSEPH GALLAGHER, RONALD GALLETTA, GEORGE GARDELIS, ROBERT GARRIGAN, THOMAS GAVIN, ARTHUR GINNINO, GARY GOLBERG, REINALDO GONZALEZ, IRVING GOODMAN, MICHAEL GOONAN, JAMES GRACE, INEZ GRAY, MICHAEL GRAY, KATHERINE GRECO, LOUIS GRECO, WALTER GREEN, MARLENE GREENE, THOMAS GROGAN, JOSEPH GUGLIOTTI, GERALD GUY, HARVEY HABER, GRANCIS HAMILTON, MICHEAL HARDIAL, WILLIAM HEIDENREICH, GERALD HEMMERLE, HENRY HEMRICK, COLEMAN HESSION, WILLIE HICKS, ALAN HILLERY, WILLIAM HOEHN, PAUL HOFMANN, CECIL HOLLEY, MELVIN HOLMES, RONLD HOPKINS, RONLD HOPKINS, JAMES HOPPER, WILLIE HUSTON, NORMAN HYMAN, CLIFFORD JACKMAN, RICHARD JAWORSKY, PATRICK JOHNSTON, RALPH JONES, ROBERT JONES, ROLAND JONES, EVELYN JORDAN, DAVID KALOS, ARNOLD KAYE, JAMES KEARNEY, WILLIAM KEARNS, DAVID KEMPH, ANGELA KENNEDY, OSKAR KLEINSTEUBER, CHARLES KNOVITCH, PETER KOUTSOUKOS, WILLIAM KOZAK, JOHN LABORA, KENNETH LANG, EVANGELIO LAPORTE, JAMES LASTRAGLIO, ARNOLD LAVECCHIA, DANIEL LAVERY, PETER LAWLOR, JOHN LEE, PATRICK LENIHAN, DANIEL LENZA, HOLMES LEONARD, JOHN LEONE, JOHN LETTERIELLO, LAWRENCE LIDGE, ZOILO LINARES, RICHARD LISZKA, ALFRED LOMBARDI, RICHARD LOMBARDI, JAMES LOVEJOY, WILLIAM LUCIANI, GREGORY LYDTING, RAYMOND MACDOWELL, MARYANN MACLELLAN, JOHN MAGUIRE, CHARLES MALONEY, JAMES MALONEY, VINCENT MALONEY, HARLD MARGOLIN, JOSEPH MARINO, EUGENE MARONEY, GEORGE MARTINEZ, MICHAEL MARTINO, MARCUS MARTIN, JAMES MARUFFI, ROBERT MASSARI, HAROLD MATHLESS, EDWARD MAZZA, JOHN MCCAULEY,

THOMAS MCCOY, PATRICK MCGOVERN, JAMES MCGUINNESS, ROBERT MCKNIGHT, KEVIN MCNAMARA, MILTON MCWILLIAMS, MICHAEL MELIA, RAPHAEL MERCARDO, TONY MIANO, JACK MICHELANGELI, EDWARD MILLER, THOMAS MILLER, STEVEN MIRABILE, JOSEPH MITCHELL, MARY MOESER, FRANK MONDIELLO, LEONARD MONROE, FRANK MONTI, WILLIAM MORRISSEY, FRANCIS MORRIS, DANIEL MOSCATIELLO, CHARLES MULE, RAPHAEL MULLALY, GARTH MULLINGS, JOSEPH MUNAFO, ERNAN MUNIZ, JORGE MUNIZ, FRANK MUNZIO, ALPHONSO MUSSO, PAUL NATALE, ROBERT NEMETH, NICHOLAS NERI, JOHN NICHOLS, ROBERT NIXON, CHARLES NOBLE, FRANK NOCERO, JOHN NORR, JOHN NUNZIATA, JOHN O'BRIEN, JOSEPH O'BRIEN, JOSEPH OCHMANN, RONALO OECHSNER, JOSEPH ORR, MARIE ORSINI, MARTIN OWENS, RAFAEL PABON, ROBERT PADULA, BERNARD PALMER, ANTHONY PANDOLA, WAYNE PARKER, JOHN PARRISH, MICHAEL PASTENA, KENNETH PATTON, MICHAEL PEPE, WILLIAM PERRONE, JAMES PETE, EUGENE PETIT, JOHN PICONE, STANLEY PIKUL, ROBERT PISTOR, JAMES POCCHIA, ROBERT POLONIO, ARTHUR POST, ARNELL PRIDGEN, GEORGE PRYKE, JAMES PRYOR, RALPH PUMA, GLANVILLE RABSATT, JOHN RAIA, JUAN RAMOS, RICHARD REDA, LEONARD REGOLIZO, EDWARD REILLY, DAVID REISENDER, JOSEPH RENNEISEN, FRANK REVELLO, WILLIAM RIOS, RONALD RIZZOTTI, DENNIS ROCCO, DOMINICK ROCCO, ROBERT ROHAN, MICHEAL ROMOLO, STUART ROSENKRANTZ, NOEL RUBIO, ROBERT RUSSELL, STANELY RUTKOWSKI, ROBERT RYAN, EDWARD SALA, ALEXANDER SAVINA, SAMUEL SCAROLA, WILLIAM SCHMIDT, THOMAS SCHOLL, BRUCE SCHRECK, SUSAN SCHULTZ, CLARISSA SCOTT, JAMES SEBBER, FRANK SERAFINO, JOSEPH SEVILLA, DENNIS SGARLATA, IRWIN SHANBERG, THOMAS SHIELDS, WILLIAM SIMMONDS, ALBERT SINATRA, EDWARD SMALL, GILBERT SMITH, EDWARD

SMOLINSKI, JAMES SOLITTO, LORENZO SOTO, BILLY SOWELL, FRANK SPANO, ROBERT SPEDALERI, ROBERT SPINOSA, EDWINDA SPRINGER, MICHAEL SQUICCIARIN, JOHN STABILE, JOSEPH STANKOVIC, EDWARD STEINBERG, WILLIAM STEINER, CATHERINE STEPINSKI, JOHN STEVENS, JOSEPH STORELLI, EDWARD STROHM, JOHN SUCHODOLSKY, DORIS SULLIVAN, WILLIAM SUTTON, WILLIAM TAVAREZ, JERRY TENENZAPH, GERLAD TEUFEL, RICHARD THESTRUP, ANTHONY TIMKO, ROBERT TIMOZEK, RONALD TONSO, LOUIS TORINO, RALPH TORRES, ERROL TOULON, VINCENT TRAUT, THOMAS TROOST, GENNARO TROTTA, ERNEST TSALDARIS, JAMES TURRISI, CALVIN TYLER, JOHN URBANO, MIGUEL VASQUEZ, ROY VELSOR, FRANK VESCE, NELSON VILLAFANE, ROBERT VOLPE, MICHAEL WALSH, PATRICK WALSH, THOMAS WARD, HARVEY WARSHAWSKY, HAROLD WASHINGTON, HAROLD WENDELL, JEROME WEREN, THEODORE WEST, REGINALD WHITE, ALPHONSE ADORNETTI, VINCENT ADORNETTI, ANTHONY AGELIRE, JAMES F. ALBACH, CARLO ALBANESE, FRANCIS R. ALBERGHINE, ANTHONY ALDUINO, LOUIS AMATO, RUSSELL ANDERSON, RONALD H. ANELLO, VICTOR E, ANNALORO, FRANCIS J. ARCATI, RENE J. ARCHAMBAULT, VINCENT ARRIGALI, VINCENT ATIGNA, MICHAEL J. ATTARD, SING STANLEY BAILEY, SALVATORE BARBIERI, THOMAS W. BARRETT, DAVID J. BARRY, JOHN BARRY, WILLIAM J. BATES, RONALD BECK, LEON HOLMES, RAYMOND F. HONAN, JOHN HORAN, WILLIAM HORVATH, RICHARD M. BECK, GERARD J. BEIRNE, JOSEPH R. BELLBER, RICHARD BENEDETTI, WALTER G. BENES, JOHN W. BENNIS, ANTHONY L. BENTIVEGNA, EDWARD M. BERK, ALAN BERKOWITZ, EUGENE D. BESCHER, GEORGE H. BETHEL, JR., HAROLD E. BETZLER, PETER R. BIENKOWSKI, JOHN V. BILELLA, JOSEPH BILELLO, JOSEPH BIMONTE, DENNIS E. BIRMINGHAM, VICTOR BIVONA, STEPHEN BLACK, WILLIAM BLAZEJEWICZ, RONALD BLOOM,

THOMAS BOGAN, JOSEPH BONEILLO, JAMES BOOS, ANTHONY BORGESE, ROBERT BOWLES, GEOFFREY BRAMAN, STEPHEN R. BRENNAN, WILLIAM A. BROADHURST, RICHARD W. BRODERICK JAMES W. BROWN, ARTHUR F. BROWNING, EDWARD J. BUEHLER, JEROME BURD, JOHN D. BURKE RAYMOND J. BURKE,JOSEPH J. BURMESTER, JOHN F. BURNS, JUNIOUS L. BURNS, RICHARD R. BURNS, ROBERT BUSCH, KENNETH BYNOE, VINCENT P. BYRNE, DERMOT CADOGAN, RALPH CAIO, RICHARD CALABRESE, PHILIP CALBO, ERNEST H. CALIFANO, DOMINIC CALOSSO, JOSE A. CAMACHO, MICHAEL P. CAMPBELL, MICHAEL A. CANADE, RICHARD I. CANNELLA, VINCENT CANNIZZ, PASQUALE CANTALUPO, PASQUALE CAPORRINO, VINCENT CAPOZZI, LEONARD CAPUTO, LOUIS P. CARAMANICA, LOUIS J. CARDILLA, VINCENT J. CARDOZO, BERNARD T. CARR, ROBERT W. CARRIGAN, EDWARD J. CASAS, ROBERT CASCIANI, EDWIN CASSAR, NICHOLAS CATELLO, RONALD CAVAGNARO, WILLIAM C. CAVANAGH, EUGENE M. CEBULSKI, ROY P. CECCATO, MARINO CESARINI, ANTHONY M. CESTARE, LOUIS CHIRICO, DANIEL A. CHOCKO, SALVATORE CIAFONE, ALEXANDER CIPRELLO, SALVATORE CIRASOLA, EDWARD A. CLAIR, JOSEPH CLARK, SR., JOHN J. CLARKE, JOHN T. CALVIN, WILLIAM J. CLIFFORD, JACOB E. COBBS, ROBERT D. COHEN, PATRICIA M. COHEN, SAMUEL H. COHEN, DONALD A. COLLINS, PATRICK J. COLLINS, MICHAEL A. COLUCCI, RALPH CONGREGANE, RONALD A. CONKLIN, RAYMOND CONLEY, JOHN W. CONLON, MICHAEL CONNOLLY, VINCENT CONTI, WILLIAM E. COPE, JAMES H. COPELAND, JR., CHARLE COROLLA, ANTHONY CORTI, THOMAS G. COSTANZO, RICHARD A. COTE, CUTHBERT B. COX, RICHARD CRAIG, DOUGLAS CRAWFORD, DAVID CREAN, ROBERT CREWS, THOMAS J. CRIMMINS, FRANK CRISA, FRANK A.CROCE, WILBERT L. CROCKETT, JAMES C. CROWE, LOUIS A. CRUZ, JAMES H. CUMMINGS, PETER M. CUMMO, JOSEPH

M. CURLEY, RAYMOND A. CURLEY, DONALD CURRENT, JOHN A. CURTIN, THEODORE A. D'ALESSANDRO, HAROLD C. D'APICE, THOMAS M. DALTON, GEORGE G. DANIEL, EDWARD J. DAWSON, DOMINIC DEPETRILLO, JOSEPH S.DEROSE, FRANCESCO M. DESIO, MICHAEL J. DEALY, ALBIN C. DEC, LAWRENCE F. DEERR, RALPH DEFELICE, CHARLES E. DEGAUST, CARMINE DELMONICO, PATRICK A. DELUCA, ANTHONY DEMAIO, JOHN DEMEIS, JOSEPH A. DIDONATO, STEPHAN DIACZUN, ANTHONY DIBELLO, PAUL DIGIACOMO, VINCENT DIMAIO, STEPHEN R. DINKO, MICHAEL J. DONELAN, JOSEPH F. DONOVAN, ALEXANDER L.DORSEY, RICHARD E. DOUGLAS, RICHARD DOYLE, JAMES A. DUDLEY, DANIEL F. DUFFY, GEORGE R. DUNN, ROBERT DONNELLY, PATRICK DWYER, EDWARD J. EASTWOOD, ROBERT T. EDLER, JOHN A. ENGLERT, RICHARD ENGLISH, DONALD J. ENNIS, GEORGE EPSTEIN, CHARLES ERWIN, JOSEPH M. ESPOSITO, WALTER FABISINSKI, RICHARD K. FALKE, GERARD FALLON, CHARLES FARKOUH, JOHN P. FARRELL, AMADEO G. FASOLINO, JOHN F. FAY, ALAN E. FELDMAN, ANTHONY FERRARI, PETER J. FERRIS, JOHN P. FERRONE, JOSEPH D. FINA, DAVID H. FISCHBEIN, WILLIAM J. FISCHER, THEODORE C. FISHER, JR., SIDNEY FITZER, JAMES FLAHIVE, RONALD FLEITMAN, MICHAEL J. FLEMING, ROBERT FORRESTER, KENNETH W. FORSTNER, MICHAEL J. FORTE, JOSEPH FRANCO, WILLIAM H. FRANEY, JOSEPH FRATINARDO, AUGUST E. FRERKS, WILLIAM FREY, MITCHELL L. FRIAR, ROBERT L. FRIBERG, WILLIAM FULLER, JR., JOSEPH FUMAI, JOSEPH F. FUNK, ANGEL R. GABEL, JOSEPH GAETA, JAMES L. GAFFNEY, MICHAEL J. GAGLIARDI, RONALD GAIL, PATRICK J. GALLIGAN, SALVATORE J. GALLO, VINCENT GALLO, JAMES GALYAS, ABRAHAM GATLING, JOHN GAUGHAN, PETER GAVIGAN, ROBERT P. GEARY, BERNHARD GEIGER, JOHN GENTILE, JACK G. GIACALONE, NAT GIAMBALVO, JOHN J. GIANGRAS-

so, Vincent J. Giattino, Anthony J. Gioia, Gregory M. Gionta, Gaetano Gliamas, Martin Gonzalez, Thomas J. Goodman, William F. Goonan, Jr., Dennis Gorman, John M. Gormley, Frank R. Grammich, Jr., Thomas Grasso, James Graziano, Kevin Green, John M. Greene, Thomas J. Greer, Albert Griffo, Luciano M. Grisonichi, Arthur C. Grix, C. Frank Guerriero, James Guidice, George W. Gulley, George Gunn, Martin Hanlon, Stephen Harnos, Jr., Arthur Heaney, Henry Heedles, Peter J. Hernandez, Pedro C. Hernandez, Richard Hesterhagen, Kevin T. Hickey, James J. Hicks, Robert Higgins, Leroy Hill, William Hinch, Walter A. Hoffman, William Holliday, Michael R. Houlihan, Raymond Hoyle, John Hrinyak, John S. Hruska, Rosario Iacone, Robert Iadarola, George Iapezzuto,William R. Ingino, David P. Ingram, Raymond Jackson, General Jackson, Jr., William C. Jensen, Robert L. Jericiau, Robert Johnson, Thomas J. Jones,Walter Jorgensen, William H. Joseph, Henry Journee, William Judge, Francis M. Kaiven, John Keane, James Keegan, Thomas M. Kelly, Henry J. Kelly, Leonard Kelly, Henry Kennedy, Harris Kenner, Jr., Edward J. Kenny, Scott Kent, Bobby D. Kerr, Donald F. Kerrigan, Jeffrey Kessell, Joseph W. Kestner, William Kiernan, Ralph S. King, Ralph J. Kirkman, Robert H. Klein, Nicholas J. Klippel, Thomas E. Kmiotek, Robert P. Koch, Raymond Kopp, Ronald E. Kopp, Joseph J. Kosar, Andrew Kovacs, Anthony F. Kozlowski, William J. Kras, Anthony Kruk, Norman L. Kunz, Harold D. Kurrus, Gerald A. Kurz, Eddie J. Kuzianik, Robert Kuzler, Louis Lapadula, Salvatore Labianca, Harold T. Lagarenne, Gene T. Lambert, Barry Landsberg, Michael Lanning, Walter P. Larkin, Peter T. Larson,

LEONARD LASKOWSKI, GEORGE LAUVE, WILLIAM J. LAWRENCE, MICHAEL J. LAWSON, JOSEPH P. LEAVEY, JOHN A. LEAVY, ALTON L. LEE, HAROLD B. LEE, CARL R. LEFORT, CONRAD A. LESNEWSKI, MICHAEL LEWIS, REGINALD LEWIS, UGO LIBECCI, ANTHONY LICCIARDELLO, JOHN F. LIPINSKI, JR., RHOYDE L. LITTLE, JR., FRANK L. LOCASIO, JR., WILLIAM LOGAN, FRANK J. LOIACONO, ANTHONY LOMANTO, VICTOR LOMBARDO, LAWRENCE LOMBARDO, PHILLIP N. LONCAR, MILLS P. LONG, JOSEPH A. LONGO, CARMINE LOPARDO, BENEDETTO LOPARRINO, WILLIAM P. LOPERFIDO, FREDERICK LOPEZ, JR., JAMES J. LOWNEY, PETER J. LUCIDO, HARRY P. MACALUSO, BRUCE A. MACDONALD, RANDOLPH E. MACK, DANTE MAFFEO, JOSEPH MAGLUILO, ROBERT MAGUIRE, PAUL J. MAHONEY, JOSEPH T. MAIBERGER, WILLIAM H. MAIER, BRUCE J. MALLORY, RICHARD MANCO, RICHARD D. MANFRE, LARRY MANISCALCO, SAMUEL MARCH, ROBERT L. MARESCO, VINCENT J. MARINO, ROBERT S. MARKS, WILLIAM MARKS, HAROLD MARQUART, ABRAHAM MARTIN, JOSEPH MARTINS, JAMES MASSA, JAMES MATTHEWS, RAYMOND MATTHEWS, LOUIS MAURO, MARIO MAURO, SALVATORE MAURO, RUDY E. MAZURCZAK, FRANCIS W. MCCARTHY, JAMES J. MCCARTHY, HENRY J. MCCORMICK, JAMES B. MCCREA, DANIEL MCGOWAN, MARTIN J. MCKEON, GEORGE MCMASTER, JOHN MCNAMEE, GERARD MCNAMEE, CYRIL J. MEISNER, HENRY J. MELCHIONA, DOMENICK MENDELLA, CALVIN J. MESSANA, NICHOLAS MICHALAS, LEO G. MILHAM, JONATHAN MILLER, JEREMIAH A. MILLS, JR., MICHAEL C. MINGHILLO, GEORGE K. MITCHELL, MARIO MOLINARI, GERARD J. MOLLOY, PAUL MOLNOSKI, MICHAEL F. MONAHAN, CHARLES J. MONGELLI, LESTER R. NOBLE, RICHARD NORDT, JOHN D. NORRIS, JOHN P. NOVAK, JOSEPH A. MONTANARO, JOSEPH MONTELEONE, JOHN MORALES, ANTHONY MORALES, ROBERT MORAN, BERNARD J. MORRIS,

THOMAS MORRISSEY, EUGENE MOSCHELLA, ANDREW R. MOSCHETTO, KENNETH MOTREUIL, JOSEPH MOTTA, FRANK J. MROWKA, THOMAS J. MULLAN, JOSEPH G. MURATORE, DONALD MURPHY, PAUL MURPHY, MICHAEL T. MURPHY, THOMAS M. MURPHY, JOSEPH M. NASO, PETER F. NEAREY, VITO NEGLIO, RONALD NELSON,DONALD G. NEUMEYER, STEPHEN NEVIN, EDWIN J. NEWLANDS, HENRY NEY, FRED J. NICKE, LEON J. NUSSBAUM, AUGUSTUS NUZZELLA, DENNIS O'BRIEN, THOMAS P. O'CONNOR, TIMOTHY O'DONOVAN, STEPHEN E. O'ROURKE, CYRIL OBERLE, JR., WALTER T. OELERICH, NORMAN OLINSKY,VINCENT ORLANDO, EDWARD OSCHMANN, PASQUALE M. OSTUNI, ALFREDO OYOLA, JUAN PAGAN, JOHN M. PAGANO, PETER PALAMARO, GEORGE PAOLUCCI, DONALD A. PARKS, ALEXANDER PASSANTE, ANTHONY PASTORE, JOSEPH PATRIARCA EDWIN C. PATTERSON, HAROLD A. PEAKS, ANTHONY PECORELLA, LOUIS PELLEGRINO, ALONZA PETERSON, JAMES M. PETERSON, JR., JOHN PETRARA, JOSEPH J. PETRIZZO, ROBERT E. PFEIFFER, ANTHONY PIAZZA, JOSEPH J. PICKETT, ALFONSO PIETRONIGRO, JOHN A. PINNA, LOUIS PISANO, FRANK C. PISCANI, JOSEPH G. PITTARO, MICHAEL P. PIZZORUSSO, NORMAN E. PORTER, RAYMOND PORTEUS, DAVID POWELL, GEORGE T. POWELL, OWEN H. PRESCOD, FRANK PREVETE, THEODORE PROBST, EDWARD PROVANZANA, ROBERT A. PROVENZANO, MICHAEL PURTILL, JOSEPH QUATELA, GEORGE RAMIREZ, WALTIS RAMSEY, EDWARD RANIERI, JOHN REGAN, ALVIN R. REID, PHILIP M. REILLY, JOHN JOSEPH REINHART, JAMES REYNOLDS, DANIEL RIZZO, DONALD D. RIZZO, EDWARD R. ROCCHIO, RENE RODRIGUEZ, KENNETH R. RIEGEL, JAMES RIFINO, STANLEY RIFKIN, RICHARD W. RIGNEY, JOSEPH F. RINKLIN, GANDOLPH J. RIOTTO, DANIEL J. RIVITUSO, RICHARD RODRIGUEZ, ORLANDO RODRIGUEZ, JAMES RODRIQUEZ, RICHARD W. ROMANCZYK, CHARLES ROMANO, LINO F. ROSADO, RAYMOND B. ROSARIO, ROBERT W. ROSE,

Lawrence Rosenberg, Paul Rosenblatt, John Rosinski, William B. Ross, Mike Rossi, Donald J. Rothschild, Theodore Rotun, Don Rowley, Cecil G. Rush, Edward Russo, Salvatore Russo, Joseph Russomanno, Miles Rutyna, John T. Ryan, Norman Sakkestad, Gaetano C. Salerno, John T. Sallust, Richard Salo, Morris Sam, Raymond J. Sanchez, Peter T. Santarpia, Arthur Santopietro, Sam Sapienza, Thomas E. Saracco, Alfred J. Sarlo, Gerald Sarubbe, Luigi Scagnelli, Michael Scarpetta, William R. Schablin, Joseph N. Schade, Fred K. Schaefer, Louis A. Schifano, Francis C. Schlimmer, William A. Schmidt, Joseph Schneider, William A. Schubert, John Sciara, Anthony Sciulli, Sr., Peter Sclafani, Vincent Scuderi, Major C. Seabury, Harold Seidel, Walter J. Sellers, Frank Sercia, Richard Sergent, Russell Serrante, Vincent Servedio, Arthur Shade, Louis Shanley, Joseph Siclari, Pasquale M. Siclari, Richard J. Sinnott, Henry G. Smith, Henry A. Smith, Joseph F. Smith, John Sneddon, Charles V. Sparrock, Robert Spence, Francis E. Stachelski, John R. Stackowitz, John H. Steigler, Joseph R. Stelmashuk, Frank Stillitano, John J. Stoehr, Donald Stone, James Storan, Sidney Talvy, Frank Tamburello, Charles Texidor, Dennis A. Timm, William E. Tingwall, Dominic L. Tobacco, John F. Toomey, Richard Trantel, Robert B. Trent, Berris Turnbull, Nicholas Turnese, Ralph Uldaneta, Joseph F. Ulla, John T. Vaccaro, Louis Valente, Adolfo Vazquez, Jr., Abraham A. Velger, Edward Vetter, Gary S. Vichinsky, John F. Vitacco, Gerald Vohrer, Anthony Vona, Alfred S. Vulpis, Frank B. Wakely, Harry Wallenstein, Edward J. Walsh, Patrick Walsh, Rodney Ward, Richard Weaver, Herbert Weiss,

EUGENE WALKER, FRED J. WENZ, JR., PATRICK J. WHALEN, CARLTON WHITE, PETER T. YASINOSKY, MICHAEL YURICK, JAMES ZACHARAKOS, NERSON G. ZAYAS, RONALD P. WHITTAKER, EDWARD J. WILKO, CLARENCE B. WILLIAMS, JOHN WILLIAMS, EDWARD L. WILSON, ROBERT WINKELMAN, ULYSSES WOODS, ISMAEL ZERBINI, RUDOLPH ZUBIKOWSKI

The respondents are, as follows:

THE SECRETARY OF TREASURY, THE COMMISSIONER OF THE INTERNAL REVENUE, THE NEW YORK CITY EMPLOYEES RETIREMENT SYSTEM, THE NEW YORK CITY POLICE PENSION FUND, THE FIRE DEPARTMENT PENSION FUND, MARTHA E. STARK, WILLIAM C. THOMPSON, JR., BETSY GOTBAUM, C. VIRGINIA FIELDS, MARTY MARKOWITZ, ADOLFO CARRION, JR., HELEN MARSHALL, JAMES MOLINARO, LILLIAN ROBERTS, ROGER TOUSSAINT, CARROLL HAYNES, JOHN J. MURPHY, MICHAEL R. BLOOMBERG, RAYMOND W. KELLY, PATRICK J. LYNCH, JOHN PUGLISSI, MUBARAK ABDUL-JABAR, SCOTT WILLIAMSON, THOMAS SCOTTO, EDWARD MULLINS, ANTHONY GARVEY, JOHN DRISCOLL, STEPHEN CASSIDY, JAMES SLEVIN, KEVIN MCADAMS, ROBERT STRAUB, PETER GORMAN, NICHOLAS VISCONTI, STEPHEN CARBONE, ANTHONY CROWELL, DIANE BRATHER, HORACIO SPARKS, MYLAN DENERSTEIN and THE CITY OF NEW YORK,

CORPORATE DISCLOSURE STATEMENT

The Secretary of Treasury and Commissioner of Internal Revenue are administrative heads of agency's of the United States of America.

The New York City Employees Retirement System, the Police Pension Fund and the Fire Department Pension Fund are quasi-public corporations. They do not issue stock, have no parent corporations and no publicly held company has any ownership interest in them.

The City of New York is a municipal corporation. It does not issue stock, has no parent corporations and no publicly held company has any ownership interest in it.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	iii
TABLE OF CONTENTS	xxvii
TABLE OF CITED AUTHORITIES	xxix
TABLE OF APPENDICES	xxxv
OPINION BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR ALLOWANCE OF THE WRIT	6
I. REVIEW IS WARRANTED TO CORRECT THE ERRONEOUS HOLDING THAT THE CODE DOES NOT CONTAIN MANDATORY REQUIREMENTS FOR TAX QUALIFICATION	10
A. The Code sets forth mandatory requirements for tax exemption	11
B. The Code sets forth "law to apply" for purpose of APA review	15

Page

C. The IRS has no authority to permit a plan to maintain tax exempt status when the plan routinely engages in the illegal diversion of pension assets 20

CONCLUSION..... 24

TABLE OF CITED AUTHORITIES

Cases *Page*

Adams v. Richardson,
480 F.2d 1159 (D.C. Cir. 1973) ..... 19 fn. 3

Armstrong v. Bush,
924 F.2d 282 (D.C Cir. 1991) ..... 16 fn. 2

Baetens v. Commissioner of Internal Revenue,
777 F.2d 1160 (6th Cir. 1985)..... 14

Bennett v. Spear,
520 U.S. 154 (1997)..... 12

Borrelli, et al. v. Secretary of Treasury, et al.,
343 F.Supp.2d 249 (S.D.N.Y. 2004), *aff'd*
__ F.3d __, 2005 WL 3150533 (2d Cir. 2005) 1

Branch Ministries v. Rossotti,
211 F.3d 137 (D.C. Cir. 2000)..... 18

Brock v. Pierce County,
476 U.S. 253 (1986)..... 15 fn. 2

Caminetti v. United States,
242 U.S. 470 (1917)..... 22

Caracci v. Commissioner,
118 T.C. 379 (Tax Court 2002)..... 18

Center for Auto Safety v. National Highway Traffic Safety Admin.,
793 F.2d 1322 (D.C. Cir. 1986) ..... 24 fn. 10

Chevron v. Natural Resources Defense Council,
467 U.S. 837 (1984).....9, 16, 17, 19, 20 fn. 6

Page

Citizens to Preserve Overton Park, Inc. v. Volpe,
401 U.S. 402 (1971).....8, 12, 15, 20

Cinotti v. Giuliani,
5 Misc. 3d 1007(A), 798 N.Y.S.2d 708
(N.Y. Sup. 2004)..... 4

Currier v. Henderson,
190 F.Supp.2d 1221 (W.D. Wa. 2002)..... 16 fn. 2

Cutaiar v. Marshall,
590 F.2d 523 (3d Cir. 1979)..... 18, 22

Davis v. Romney,
355 F.Supp. 29 (E.D. Pa. 1973)....., 16 fn. 2

Deputy v. du Pont,
308 U.S. 488 (1940)..... 6

Dunlop v. Bachowski,
421 U.S. 560 (1975)..... 12

Ellis v. Chao,
336 F.3d 114 (2d Cir. 2003)..... 12

Escoe v. Zerbst,
295 U.S. 490 (1935)..... 11

Gagliardo v. Dinkins,
89 N.Y.2d 62, 651 N.Y.S.2d 368
(Ct. App. 1996).....4, 21 fn. 7, 24 fn. 11

Giacobbi v. Berman,
780 F.Supp. 33 (D.D.C. 1992).....16 fn. 2, 20 fn. 6

Guerrero v. Garza,
418 F.Supp. 182 (D.C. Wis. 1976)..... 19 fn. 3

Page

Heckler v. Chaney,
470 U.S. 821 (1985)..... 8, 12, 15

Int'l Labor Rights Educ. And Research Fund v. Bush, 954 F.2d 745 (D.C. Cir. 1992)..... 16 fn. 2

Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 31 (1998) 12

Lopez v. Davis,
531 U.S. 230 (2001)..... 12

Matter of Kline v. Feinblatt,
403 F.Supp. 974 (D.C. Md 1975) 18

McKown v. U.S. Dep't of Agriculture,
276 F.Supp.2d 1201 (Dist. N.M. 2003) ..... 16 fn. 2

Mead Corp. v. Tilley,
490 U.S. 714 (1989)..... 22

NLRB v. Food & Commercial Workers,
484 U.S. 112 (1987)..... 16

PBGC v.LTV Corp.,
496 U.S. 633 (1990)..... 16

Raymond Proffitt Foundation v. U.S. Army Corps of Engineers, 343 F.3d 199 (3rd Cir. 2003).. 16 fn. 2

Rollins v. Commissioner,
2004 WL 2580602 (Tax Court 2004)..... 17

Tavannes Watch Co. v. C.I.R.,
176 F.2d 211 (2d Cir. 1949).....19, 19 fn. 4, 25 fn. 11

Trenton v. Scott Paper Co.,
832 F.2d 806 (3d Cir. 1987)..... 25 fn. 11

Page

Westchester Plastic Surgical Assocs. v. Commissioner of Internal Revenue, 78 T.C.M. 756 (T.C. 1999) 14

White v. United States, 305 U.S. 281 (1938)..... 8

Wingers Dep't Store, Inc.. v. Commissioner of Internal Revenue, 82 T.C. 869 (T.C. 1984) .. 14

Statutes:

5 U.S.C. § 551 ..... 1, 8, 14

26 U.S.C. § 401.....1-2, 4-13, 15, 19 fn. 4, 20-23

26 U.S.C. § 414 2

26 U.S.C. § 501.....2, 4, 10, 18, 19 fn. 4, 20

26 U.S.C. § 503 ..... 1, 4, 5, 7-14, 18-20, 22-23, 24, fn. 9

26 U.S.C. § 4975 ..... 1, 8, 14

28 U.S.C. § 1254 1

26 C.F.R. § 1.503(a)-1..... 13, 18

26 C.F.R. § 1.503(c)-1..... 24 fn. 9

New York State Constitution, Article V, Section 7..... 3

Administrative Code of the City of New York § 13-101 *et seq.*..... 2-4

Administrative Code of the City of New York § 13-201 *et seq.*..... 2-4

Page

Administrative Code of the City of New York
§ 13-301 *et seq.* 2-4

Miscellaneous:

Rev. Rul. 67-9, 1967 C.B. 143,
1967 WL 15443 (1967) ..... 17, 24 fn. 9

Rev. Rul. 73-534, 1973-2 CB 132 ..... 17, 22

IRS Letter Ruling 8752002 23

Private Letter Ruling 9723033 22

Memorandum Dated June 14, 1972, from Tax
Legislative Counsel to the Director,
Miscellaneous and Special Provisions
Tax Division 23

General Counsel Memorandum 35030,
1972 WL 32303 (IRS GCM) 18, 22

S.Rep. No. 383, 93d Cong., 1st Sess. at 94-95
(1973), U.S.Code Cong. & Admin.News
1974, p. 4978 (1974-4 C.B.Supp. 80,
173-74) 23

House Report Nos. 94-658, 94-1380, Senate
Report No. 94-938, at 585 and House
Conference Report No. 94-1515, 1976 U.S.
Code Cong. and Adm.News, p. 2897 13

S.Rep. No. 383, 93d Cong., 1st Sess. at 94-95
(1973), U.S.Code Cong. & Admin.News 1974,
p. 4978 (1974-4 C.B.Supp. 80, 173-74) 13

Page

U.S. Department of the Treasury's Proposals to Improve Compliance by Tax-Exempt Organizations: Hearing Before the Subcommittee on Oversight of the House Committee on Ways and Means, 103d Cong., 2d Sess. 17 (1994). 13

Mertens: Law of Federal Income Taxation, § 34:250—Effect of Engaging in Prohibited Transactions (2002) 23

16 Cumb. L. Rev. 301, 315-16 (1985-1986)..... 23

2004 Wilshire Report on City and County Retirement Systems: Funding Levels and Asset Allocation, Wilshire Associates, October 1, 2004 9

TABLE OF APPENDICES

	Page
Appendix A—Opinion Of The United States Court of Appeals For The Second Circuit Dated And Decided November 28, 2005	1a
Appendix B—Order Of The United States District Court For The Southern District Of New York Dated And Filed November 16, 2004	6a
Appendix C—Opinion Of The United States Court of Appeals For The Second Circuit Denying Petition for Rehearing And Rehearing *En Banc* Dated April 24, 2006	18a
Appendix D—Closing Agreement of Final Determination Covering Specific Matters Dated January 31, 2003	20a
Appendix E—Statutes Involved	26a

OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at *Borrelli v. Secretary of Treasury*, __ F.3d __, 2005 WL 3150533 (2d Cir. 2005). Rehearing and rehearing en banc was denied on April 24, 2006. The Second Circuit affirmed the November 16, 2004 decision of the United States District Court for the Southern District of New York, reported at 343 F. Supp. 2d 249 (S.D.N.Y. 2004). *See,* Appendices A-C.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 26 United States Code, Section 501
Exemption from tax on corporations, certain trusts, etc.

(a) Exemption from taxation.—An organization described in subsection (c) or (d) or section 401(a) shall be exempt from taxation under this subtitle unless such exemption is denied under section 502 or 503.

The provisions of 5 U.S.C § 702, 26 U.S.C § 401(a)(2), 26 U.S.C. § 503(a)(1)(B), (b) and (c) and 26 U.S.C. § 4975 are lengthy and, therefore, set out in Appendix E pursuant to Supreme Court Rule 14.1(f).

STATEMENT OF THE CASE

The New York CITY Employees Retirement System ("NYCERS"), the Police Pension Fund ("PPF") and the Fire Department Pension Fund ("FDPF") (collectively "CITY Pension Funds") are qualified tax-exempt pension plans pursuant to Code §§ 401(a)(2) and 501, constitute governmental plans under Code § 414(d) and are exempt from the provisions of ERISA under 29 U.S.C. § 1003(b)(1). At all times relevant hereto including the present, the CITY Pension Funds have been underfunded. In 1970 the employer of the plans, respondent City of New York ("CITY") began diverting assets from the PPF and the FDPF to finance the payment of non-pension benefits it created known as the Police Officers Variable Supplements Fund ("POVSF"), Police Superior Officers Variable Supplements Fund ("PSOVSF"), Fire Department Variable Supplements Fund ("FDVSF"), and Fire Department Superior Officers Variable Supplements Fund ("FPSOVSF") (collectively "variable supplement funds," "VSF benefit" or "VSF funds"). *See, NYC Administrative Code* §§ 13-268 *et seq.;* 13-278 *et seq.* The amount of pension assets diverted, appropriately identified by statute as the "skim," are determined by the performance of the stock market; to wit, the better the stock market performed the larger the "skim." *See, NYC Admin. Code* §§ 13-232, 13-232.1, 13-232.2, 13-232.3, 13-335, 13-335.1, 13-335.2 and 13-335.3. In 1992, the Transit Police Officers Variable Supplements Fund ("TPOVSF"), Transit Police Superior Officers' Variable Supplements Fund ("TPSOVSF"), Housing Police Officer Variable Supplements Fund ("HPOVSF") and the Housing Police Superior Officers Variable Supplements Fund ("HPSOVSF") were created utilizing the same Fund-

ing mechanism. *See, NYC Admin.Code* §§ 13-193[1], 13-193[2], 13-391.1, 13-193.2.

The "skim" diverts pension assets from the underfunded CITY Pension Funds to the VSF funds. VSF funds are, by statute, defined to "not be, and shall not constitute, a pension or retirement system or fund" and payments made from the VSF Funds "shall not constitut[e] a pension or retirement allowance." *See, NYC Admin. Code* §§ 13-191[1](2)(b), 13-192[1](2)(b), 13-191[2](2)(b), 13-192[2](2)(b), 13-194(2)(b), 13-269(b), 13-279(b), 13-383(b) and 13-393(b)). The monies are skimmed annually from the CITY Pension Funds and transferred to the different VSF funds, notwithstanding the fact the monies being transferred represent petitioners' accrued benefits.

From 1987 through 1992, the CITY, emboldened with its success in diverting pension assets for non-pension purposes, amended the trust instruments of the three CITY Pension Funds to increase the amount of stock investments by the CITY Pension Funds and concomitantly increase the "skims." As a result, in just one year the pension assets skimmed from the three CITY Pension Funds and appropriated to the VSF funds exceeded $1.2 billion dollars. In addition, the CITY diverted $177 million dollars to its general fund to balance its budget.

Because each of the CITY Pension Funds were underfunded, lawsuits were commenced in state court under the Pension Impairment Clause of Article V, Section 7 of the New York State Constitution, to stop the illegal transfer of pension assets to the non-pension VSF funds, and to stop the respondent CITY from diverting the $177 million dollars to its general fund. However, because the CITY was still able to pay monthly pension benefits to retirees and

the state constitution only protects 'naked pension rights *qua* rights,' the Court of Appeals in *Gagliardo v. Dinkins*, 89 N.Y.2d 62, 651 N.Y.S.2d 368 (1996), dismissed the state claims.

Thereafter, legislation was proposed to further amend the trust instruments of the three CITY Pension Funds to provide for numerous additional VSF funds. Fearing further degradation of the CITY Pension Funds, and with no remaining alternative, petitioners notified the respondent IRS in 1998 of the illegal diversions within the three CITY Pension Funds and the fact that respondent CITY was violating Code §§ 401(a)(2), 501(a) and 503(a)(1)(B).

In 2000, respondent CITY, with full knowledge of the illegality of funding VSF funds with pension assets, created two more VSF funds within NYCERS, the Correction Officers Variable Supplements Fund and the Correction Captains' and Above Variable Supplements Fund. At the same time, the CITY amended the NYCERS trust instrument to require NYCERS to fund the annual requirements of the TPOVSF, TPSOVSF, HPOVSF, and HPSOVSF based upon the need of these VSF funds, irrespective of stock market performance or the financial condition of the NYCERS plan itself. *See, NYC Admin. Code* §§ 13-191[1](11), 13-191[2](11), 13-192[1](11), 13-192[2](11).

Prompted by the creation of the new VSF funds, petitioners filed a request for a determination letter with the IRS and commenced a state action against the respondent CITY and the trustees of NYCERS, *Cinotti v. Giuliani*, 5 Misc.3d 1007(A), 798 N.Y.S.2d 708 (N.Y. Sup. 2004), seeking to enjoin payment of funds from the new VSF funds and to compel respondent CITY to obtain a determination letter from the IRS that transfers of assets from an

underfunded pension plan to a non-pension fund would not jeopardize the tax-exempt status of the NYCERS pension plan.

On January 31, 2003, respondent IRS entered into a Closing Agreement of Final Determination with respondent CITY. *See,* Appendix D. In the Closing Agreement, the IRS determined that the CITY's diversion of $177 million dollars violated Code § 401(a)(2) and that the trust instruments did not comply with Code §§ 401(a)(2) and 401(a)(9). The IRS, however, elected to waive any sanction due from the CITY as a result of the Code § 401(a)(2) violations and to treat the pension funds as not having been disqualified by the $177 million dollar transfer. Most importantly, the IRS elected not to treat the diversions of billions of dollars in pension assets to the non-pension VSF funds as violations of the Code, and allowed the illegal transfers to continue without revoking the tax-exempt status of the CITY Pension Funds.

In response, petitioners commenced the instant action in district court under the APA, seeking to review the respondent IRS' actions in entering the Closing Agreement. The claim asserts that the IRS completely disregarded the legislative direction when it ignored the requirements for tax-exemption expressly set forth in Code §§ 401(a)(2) and 503(a)(1)(B); that the IRS was without discretion in enforcing the statutory requirements for tax exemption; and that the IRS abused its discretion by not treating the transfers from the CITY Pension Funds to the non-pension VSF's as prohibited transactions and violations of the "exclusive benefit rule." Specifically, the claim seeks revocation of the CITY Pension Funds tax-exempt status until the illegally diverted assets are restored and the trust

instruments are amended to prevent the transfer of assets to the respondent CITY and to the non-pension VSF funds.

Respondents filed Motions to Dismiss under Federal Rules of Civil Procedure, Rule 12(b). In what can only be described as result oriented jurisprudence, the district court dismissed the claim on the ground that there was no law for the IRS to enforce with regard to the requirements of tax qualification and that therefore, the Court lacked subject matter jurisdiction under the APA over the acts of the IRS.

Petitioners filed their Notice of Appeal on December 2, 2004. On November 28, 2005, the Second Circuit affirmed the district court decision holding that the Internal Revenue Code has "no mandatory language circumscribing the enforcement of the exclusive benefit rule" and thus the IRS has absolute discretion on whether and when to enforce the exclusive benefit rule of Code § 401. Petitioners timely filed their Petition for Panel Rehearing with Suggestion for Rehearing *En Banc* on January 12, 2006. On April 24, 2006, the Second Circuit denied their Petition.

REASONS FOR ALLOWANCE OF THE WRIT

The writ poses one very serious question to this Court, should the Court permit the sacrifice of the 'plain, obvious and rational meaning' of the Internal Revenue Code for 'the exigency of a hard case.' *Deputy v. du Pont*, 308 U.S. 488, 502 (1940).

Here, the respondent CITY has violated the most basic requirement for tax-exempt status by illegally diverting pension assets for non-pension purposes. In fact, the illegal diversions are ongoing. This is not in dispute. Howev-

er, rather than follow the mandatory language of the Code and the age old principle that 'tax exemption is a matter of legislative grace that must be strictly construed' and remove the tax exempt status of the CITY pension funds, the Second Circuit turned established law on its head when it held that the Code contained no "mandatory language" for the enforcement of the exclusive benefit rule. Moreover, there is not a single precedent at any level that allows a pension fund to maintain tax exempt status yet illegally divert its assets for non-pension purposes. The sanctity of pension assets is the most fundamental requirement for tax-exempt status. Thus, the Second Circuit's decision is wrong and review is warranted because it erroneously provides the IRS with absolute discretion in enforcing the requirements for tax exemption under Code § 401(a).

In addition, review is warranted to clarify whether there is a distinction between transactions that violate Code § 401(a)(2) and "prohibited transactions." Notwithstanding the virtually identical language of Code § 401(a)(2) and Code § 503(b)(6), the Second Circuit held that the illegal diversion of billions of dollars of pension assets can be a Code § 401(a)(2) violation but not a "prohibited transaction." However, the language of Code § 401(a)(2), 'any transaction that illegally diverts pension corpus or income,' is virtually identical to the definition of "prohibited transaction" in Code § 503(b)(6), "*any* other transaction which results in a substantial diversion." The Second Circuit's distinction between the two notwithstanding the similarity of the statutory language in each section is illogical. The obvious uniformity in the Code is the natural reading of the statutory language. Therefore, when a plan illegally diverts billions of dollars in pension assets, the diversion is both a Code § 401(a)(2) violation and a "pro-

hibited transaction" under Code § 503(a)(1)(B). In such situations, the IRS lacks any discretion in whether or not to enforce the mandatory revocation provisions of the Code.

By holding there is a distinction between Code § 401(a)(2) violations and "prohibited transactions," the Second Circuit has opened up 'pandora's box' for municipal and charitable plans under Code § 401(a)(1)(B) and private plans under Code § 4975. With this newly created distinction, both the IRS and offending pension plans are free to argue in any given case, that disqualification for illegal diversions or the excise tax provisions of Code § 4975 do not apply, because the transaction was not a "prohibited transaction" but 'merely' violated Code § 401(a)(2). Clearly Congress did not intend the qualification requirements of the Code to be so uncertain.

Review is also warranted because the Second Circuit has played a "cat-and-mouse" game with the "law to apply" standard of the APA in an effort to obscure the effective legal impact of their decision and to deflect review by this Court. The Second Circuit's decision held that the qualifying language of Code § 401(a)(2) ('shall be tax exempt if it is impossible') and 503(a)(1)(B) ('shall not be tax exempt if it engages in prohibited transactions') did not constitute mandatory language. However, this Court has held that use of similar "*shall ... unless*" language "set clear guidelines" and set forth "law to apply." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971); *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). This Court should therefore, address the issue in order to restore predictability and uniformity with the law.

Finally, in finding that there was no "law to apply" and then allowing the CITY Pension Funds to maintain their

tax exempt status, the Second Circuit not only ignored the "plain and explicit" language of the Code but it also failed to follow the principles established by *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The IRS's decision to allow the CITY Pension Funds to continue to divert pension assets yet maintain their tax exempt status is not only contrary to all prior precedent, but it is an impermissible construction of the Code. Congress enacted the *per se* requirements of Code §§ 401(a)(2) and 503(a)(1)(B) as preventive measures for the welfare of the employees, to insure that it would be impossible for pension assets to be used for non-pension purposes. In crafting its decision to hold that there is no "law to apply" just to prevent review under the APA, the Second Circuit not only handed the IRS unfettered discretion in determining tax qualification but, it effectively legislated from the bench by reconstructing the entire statutory scheme for tax exemption under the Code. *See, White v. United States*, 305 U.S. 281, 292 (1938) (the case for broadening a tax deduction statute beyond its plain meaning to avoid harsh results are more properly addressed to Congress than to the courts.)

With over 2,650 municipal plans nationwide already at least 366 billion dollars underfunded, and the 2002 financial reports in the record indicating that CITY Pension Funds were underfunded by over $14 billion dollars, the future viability of municipal pension plans is already in great danger. *See, 2004 Wilshire Report* on CITY and County Retirement Systems: Funding Levels and Asset Allocation, Wilshire Associates, October 1, 2004, pp. 18-19. When you add to it the fact that municipal pension members like petitioners are not protected by ERISA, have no avenue to seek redress of pension diversions in state or

federal court, and are relegated to the protections afforded to them under the Code and the APA, this Court cannot foreclose any avenue of review.

Allowing the outright theft of pension assets in this manner while precluding review creates a tremendous potential for abuse. Every municipality, especially those experiencing financial difficulties, has a tremendous incentive to raid its respective pension plans. Not only is the IRS unlikely to be policing municipal pension plans in the first place, especially with review under the APA foreclosed by this case, but with no penalty to deter such action, there is nothing to stop municipalities from raiding pension fund assets as the CITY has done. This Court cannot afford to sweeten the incentive for municipalities to use their pension systems as their own checking account without providing any form of review. It is not what the statute or Congress intended.

I. REVIEW IS WARRANTED TO CORRECT THE ERRONEOUS HOLDING THAT THE CODE DOES NOT CONTAIN MANDATORY REQUIREMENTS FOR TAX QUALIFICATION

Code §§ 401(a)(2), 501(a), 503(a)(1)(B) and 503(b) details the "Requirements for qualification" or "Requirements for exemption" set forth by Congress. Read together, to qualify for tax exempt status, it must be impossible for the corpus or income of a pension plan to be diverted for non-pension purposes. *See,* §§ 401(a)(2); 503(a)(1)(B). An otherwise qualified governmental pension plan will lose its tax exempt status if it engages in a prohibited transaction, with the loss of tax exempt status lasting for a

minimum of one year provided the illegally diverted assets are returned. *See,* Code §§ 503(a)(1)(B), (b) and (c).

Here, the CITY Pension Funds have engaged and are engaging in multiple violations of the Code. Since 1970, the total amount of assets illegally diverted to the non-pension VSF funds exceeds $10 billion dollars and that number is growing with every ongoing diversion. On top of that, the CITY has diverted $177 million dollars to its general fund. Although these diversions violate the 'Requirements for exemption and qualification' under Code §§ 401(a)(2) and 503(a)(1)(B), the IRS has elected not to "treat" the diversions as disqualifying the CITY Pension Funds. Thus, the first question that must be answered is whether tax exemption is established by mandatory language in the Code or the absolute discretion of the IRS?

A. The Code sets forth mandatory requirements for tax exemption

The Second Circuit's decision held that "[t]he tax code contains no mandatory language circumscribing the IRS's discretion in enforcing the exclusive benefit rule." However, Code § 401(a)(2) states that a plan "*shall* constitute a qualified trust . . . *if* it is impossible at *any time* . . . for *any* part of the corpus or income to be . . . diverted." Similarly, Code § 503(a)(1)(B) specifically states that a fund "*shall not* be exempt from taxation . . . *if* it has engaged in a prohibited transaction." A plain reading of the mandatory "shall" language in the Code and this Court's holdings flatly contradict the Second Circuit's decision. *Escoe v. Zerbst*, 295 U.S. 490, 494 (1935) (Congress' use of the term "shall" is a command). Indeed, Congress' use of the word "shall" has long been held as creating a mandatory

obligation. *See, e.g., Lopez v. Davis*, 531 U.S. 230, 241 (2001) ("the statute's use of the permissive 'may' contrasts with Congress' use of a mandatory 'shall' elsewhere in [the statute] to impose discretionless obligations. . ."); *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 31 (1998) ("The Panel's instruction comes in terms of the mandatory 'shall,' which normally creates an obligation impervious to judicial discretion."); *Dunlop v. Bachowski*, 421 U.S. 560 (1975) (use of "shall" withdrew discretion from agency and provided guidelines for exercise of enforcement); *Bennett v. Spear*, 520 U.S. 154, 172 (1997) (use of 'shall' constitutes a "categorical requirement to act"); *Ellis v. Chao*, 336 F.3d 114 (2d Cir. 2003) ("shall" usually means must).

In fact, based upon this Court's opinions in *Heckler* and *Overton Park,* the language of Code § 401(a)(2), "shall constitute a qualified trust instrument . . . if [ ] it is impossible," and the language of Code § 503(a)(1)(B), "shall not be exempt . . . if it has engaged in a prohibited transaction," is unambiguous. In *Overton Park, supra,* the Supreme Court stated that virtually identical language of "shall . . . unless" was "plain and explicit" and, as the Supreme Court in *Heckler* stated, "set clear guidelines for determining when such approval should be given." *Overton Park, supra*, 401 U.S. at 411; *Heckler, supra*, 470 U.S. at 414.

The Second Circuit's interpretation in this case is not even consistent with the opinion of the IRS's Commissioner. Commissioner of the Internal Revenue, Margaret Milner Richardson stated under oath in 1994 that "the *only* sanction for violation of these and other exempt organization standards is revocation of the exemption (emphasis

added)." *See,* U.S. Department of the Treasury's Proposals to Improve Compliance by Tax-Exempt Organizations: Hearing Before the Subcommittee on Oversight of the House Committee on Ways and Means, 103d Cong., 2d Sess. 17 (1994). More importantly, the Second Circuit's decision contradicts the House and Senate Committee reports which state that *the tax status of an organization is defined by statute and does not depend on the position of the IRS. See,* House Report Nos. 94-658, 94-1380, Senate Report No. 94-938, at 585 and House Conference Report No. 94-1515; 1976 U.S.Code Cong. and Adm.News, p. 2897.

The Second Circuit's attempt to create a distinction between a violation of Code § 401(a)(2) and a prohibited transaction under Code § 503(a)(1)(B) to blurry the mandatory requirements for tax exemption in the Code is unavailing.

First, contrary to the Second Circuit's holding, both the Code and the IRS's own regulations confirm that transactions which violate Code § 401(a)(2) fit within the definition of "prohibited transactions" under Code § 503(b). 26 C.F.R. § 1.503(a)-1(b) ("The prohibited transactions enumerated in section 503(b) are in addition to and not in limitation of the restrictions contained in . . . section 401(a)").

Second, the two types of transactions that are at issue here, the $177 million dollar diversion, and the ongoing diversion to fund the VSF funds, squarely fall within the definition of "prohibited transaction" under Code § 503(b)(6) as "any other transaction which results in a substantial diversion of its income or corpus . . ." Thus, without a doubt, the transactions before the Second Circuit were not only Code § 401(a)(2) violations, but also pro-

hibited transactions under Code § 503(b)(6). Therefore, the Second Circuit was wrong, the mandatory revocation provisions of Code § 503(a)(1)(B) applied to the illegal diversions.

Finally, the Second Circuit's citation to *Westchester Plastic Surgical Assocs. v. C.I.R.*, 78 T.C.M. 756 (T.C. 1999) for the proposition that there are a "'broad range of alternative remedies' for violations of the exclusive benefit rule" is desperate. The "broad range of remedies" alluded to in *Westchester Plastic, supra,* only apply to private plans under Code § 4975(g)(2) not governmental plans. *Compare,* Code § 4975(g)(2) (excise taxes do not apply to governmental plans) *with* Code § 503(a)(1)(B) (mandatory revocation applies to governmental plans). Indeed, in *Wingers Dep't Store, Inc. v. Commissioner*, 82 T.C. 869, 887-88 (1984), the case cited by the court in *Westchester Plastic, supra,* the holding confirmed that Code § 503 was amended by Title II of ERISA so that its mandatory revocation provisions no longer applied to private plans which are now subject to graduated penalties under Code § 4975. *See, Wingers Dep't Store, supra,* 82 T.C. at 885. Therefore, the mandatory revocation provisions are the only remedy for the illegal diversion of municipal pension plan assets. *See,* Code § 4975(g)(2); *Baetens v. Commissioner of Internal Revenue*, 777 F.2d 1160, 1164-65 (6th Cir. 1985) (although Congress removed plan disqualification as a sanction for participation in a prohibited transaction for most plans when it created ERISA, Congress specifically, retained plan disqualification as the penalty for municipal plans under Code § 503(a)(1)(B)).

B. The Code sets forth "law to apply" for purpose of APA review

The Second Circuit's preclusion of APA review was also improper not only because the language was mandatory, but because the IRS acted by entering into the Closing Agreement,[1] and "that action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner. The action at least can be reviewed to determine whether the agency exceeded its statutory powers." *Heckler, supra*, 470 U.S. at 832.

As previously stated, this Court in *Overton Park* held the same "shall . . . unless" language provided "'law to apply' and thus [that] the exception for action 'committed to agency discretion' [wa]s inapplicable." In *Overton Park,* this Court specifically rejected the same cramped, conclusory analysis adopted by the Second Circuit that the "shall . . . if" language of Code § 401(a)(2) was not mandatory language. *Overton Park, supra,* 401 U.S. at 411, 414 ("shall not . . . unless" constitutes clear statutory language and provides 'law to apply'); *Heckler, supra,* 470 U.S. at 414 ("shall not . . . unless" statutory language in *Overton Park* set clear guidelines). Instead, the analysis by the Supreme Court in *Overton Park* and *Heckler* makes clear, the language at issue in Code § 401(a)(2) set forth specific guidelines for determining whether a trust constitutes a qualified trust.[2]

---

[1] Clearly the IRS' entry into a Closing Agreement of Final Determination in which it imposed and waived sanctions, made findings, and imposed its final determination all after an investigation of the CITY Pension Funds, constituted action under the APA. *See,* APA § 551(13).

[2] In fact, in every reported case where the statute at issue contained the word "shall," courts have found "law to apply" under the APA. *See, e.g., Brock v. Pierce County,* 476 U.S. 253, 260 n. 7 (1986)

But, even if the Second Circuit still felt there was some ambiguity, they were not free to "impose [their] own construction on the statute." *Chevron, supra,* 467 U.S. at 843. Rather, their role was to determine whether the IRS's interpretation was a "'permissible' construction of the statute, that is, a construction that is rational and consistent with the statute." *PBGC v. LTV Corp.*, 496 U.S. 633, 650 (1990) *quoting NLRB v. Food & Commercial Workers,* 484 U.S. 112, 123 (1987).

This Court has made very clear the analysis the Second Circuit should have taken when faced with IRS action and its conclusion that the Code did not provide mandatory direction in enforcement:

(where the statutory command is that the agency shall act, a complainant adversely affected by the failure to act may bring an action in district court); *Raymond Proffitt Foundation v. U.S. Army Corps of Engineers*, 343 F.3d 199 (3rd Cir. 2003) (statute is not "written in language of permission and discretion" when it contains word "shall," thus, there is "law to apply"); *Int'l Labor Rights Educ. And Research Fund v. Bush*, 954 F.2d 745, 758 (D.C. Cir. 1992) ("the Supreme Court has indicated that mandatory language is a reliable indication that Congress intended the application of a statute to be subject to judicial review."); *Armstrong v. Bush*, 924 F.2d 282 (D.C Cir. 1991) (use of words "shall establish" provides sufficient "law to apply"); *McKown v. U.S. Dep't of Agriculture*, 276 F.Supp.2d 1201 (Dist. N.M. 2003) (use of "shall" was mandatory not discretionary, thus, decision was not committed to agency discretion by law and APA § 701(a)(2) does not apply); *Currier v. Henderson*, 190 F.Supp.2d 1221 (W.D. Wa. 2002) (use of words "shall not" in statute constituted an express prohibition and thus, jurisdiction under APA over Postal Service was valid since agency lacked discretion); *Giacobbi v. Berman*, 780 F.Supp. 33 (D.D.C. 1992) (use of word "shall" in statute limits agency discretion and removes case from the *Heckler* presumption of nonreviewability); *Davis v. Romney*, 355 F.Supp. 29 (E.D. Pa. 1973) ("word 'shall' as used in any statute does not confer discretion but rather commands" and creates a mandatory duty).

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based upon a permissible construction of the statute.

Chevron, supra, 467 U.S. at 842-43.

Had the Second Circuit heeded *Chevron,* it could not have reached the conclusion it did. The most logical reading of the plain language of the statutory provisions is the one previously adopted by the IRS and the one followed by every other Court, the illegal diversion of pension assets mandates loss of tax exempt status. *See, e.g.,* Rev. Rul. 73-534, 1973-2 CB 132 (qualified status of overfunded pension plan affected by transfer of surplus funds to another qualified pension plan of the same employer that was underfunded); Rev. Rul. 67-9, 1967 C.B. 143, 1967 WL 15443 (1967) ("exemption from Federal income taxes does not extend to an organization engaged in a prohibited transaction."); *Rollins v. Commissioner*, 2004 WL 2580602 (Tax Court 2004) (Congress enacted Code § 4941 to

remove private foundations from the disqualification provisions of Code § 503); *Caracci v. Commissioner*, 118 T.C. 379 (Tax Court 2002) (before the enactment of Code § 4958, if a public charity or social welfare organization "did not comply with the rules regarding tax exemption, the Commissioner's only recourse was to revoke the organization's exemption (emphasis added)"); *see also, Branch Ministries v. Rossotti*, 211 F.3d 137, 142 (D.C. Cir. 2000) ("The Code, in short, specifically states that organizations that fail to comply with the restrictions set forth in section 501(c) are not qualified to receive the tax exemption that it provides."); *Matter of Kline v. Feinblatt*, 403 F.Supp. 974 (D.C. Md 1975) (before enactment of Code § 4941, private foundations would lose its tax exempt status if it engaged in prohibited transaction); *see generally,* 26 C.F.R. § 1.503(a)-1 (Denial of exemption to certain organizations engaged in prohibited transactions); 26 C.F.R. § 1.501(a)-1 (same); General Counsel Memorandum 35030, 1972 WL 32303 (IRS GCM) (transfer of funds from Plan A, a plan encompassing all employees, to a separate Plan B, a plan encompassing only a portion of Plan A's employees, is a transfer for purposes other than for the benefit of the employees or their beneficiaries covered by Plan A, prior to the satisfaction of all liabilities under Plan A); *cf. Cutaiar v. Marshall*, 590 F.2d 523 (3d Cir. 1979) (Court struck down transfer from one plan encompassing all employees to plan that does not cover all employees under Congressional intent of ERISA).

In fact, Congress' intent that revocation be mandatory for all diversions within public plans is apparent in Code § 503(b)(6) since that section defined "prohibited transaction" in the broadest sense as "*any* [ ] transaction which results in a substantial diversion," thus, even indirect

diversions of municipal pension assets like unsecured loans, requires a funds loss of tax exempt status. *See,* Code § 503(a)(1)(B), (b)(1),(6).[3] In view of that broad language, and keeping in mind the overriding purpose of protecting the welfare of employees from the diversion of pension assets (*see, Tavannes Watch Co. v. C.I.R.*, 176 F.2d 211, 216 (2d Cir. 1949)),[4] it is inconceivable that Congress' intent was to mandate loss of tax exempt status for indirect diversions of pension assets but not for the direct diversion of assets of a plan.[5]

In sum, the IRS's interpretation fails the *Chevron* test. It cannot be considered rational for the IRS to hold that every conceivable kind of illegal diversion of pension assets requires loss of tax exempt status *except* the diversion of pension assets itself. It is also not rational to conclude that the diversion of billions of dollars in pension assets to fund a non-pension benefit did not constitute engaging in "any other transaction which results in a substantial diversion of its income or corpus" under Code § 503(b)(6).

---

[3] Where the statute contains specific criteria by which noncompliance with the statute can be determined and where "the statute indicates with precision the measures available to enforce the [statute]," judicial review is always available. *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973); *Guerrero v. Garza*, 418 F.Supp. 182 (D.C. Wis. 1976).

[4] Ironically, here, petitioners allege the exact types of injuries Congress intended to prevent by enacting Code 401, 501 and 503. *See, Tavannes, supra.*

[5] The Second Circuit's construction leads to the absurd conclusion that an unsecured loan would require loss of tax exempt status but an outright theft by the plan sponsor would not.

Therefore, it is clear from the legislative history, the plain meaning of Code § 401(a)(2) and its purpose, that it was an improper construction of the Code for the IRS to permit the CITY Pension Funds to maintain tax exempt status, because tax exempt status is determined by the clear guidelines set forth in the Code §§ 401, 501 and 503.[6]

Thus, contrary to the panel's decision, there definitely was "law to apply" and the APA did not preclude review since the qualification provisions of the Code did not fit within the very rare, narrow exception of "committed to agency discretion by law." *Citizens to Preserve Overton Park, supra,* 401 U.S. at 410 (the principle of presumptive reviewability within the APA requires clear and convincing evidence of legislative intent to cut off judicial review).

C. The IRS has no authority to permit a plan to maintain tax exempt status when the plan routinely engages in the illegal diversion of pension assets

Even assuming this Court were to hold that the IRS has the authority to escape Congress' direction and evade disqualification by engaging in semantics, the next logical question is whether it was 'arbitrary, capricious or an abuse of discretion' for the IRS to permit a plan to maintain tax exempt status even though it does not meet the requirements for tax exemption because it routinely

---

[6] If the intent of Congress is clear, we must give it effect since an agency's interpretation of its governing statute that contravenes Congress' unambiguously expressed intent is not entitled to judicial deference. *Chevron, supra*, 467 U.S. at 842-843. *Giacobbi, supra,* 780 F.Supp. at 38 ("If "agency action is found not to be reasonably consistent" with the intent of Congress to pursue a general goal, the courts must invalidate agency action.")

engages in the illegal diversion of assets to non-pension funds?

Here, the CITY Pension Funds routinely divert corpus and income to a non-pension VSF fund.[7] These non-pension VSF funds are "separate funds" from the CITY Pension Funds, and not part of a "single plan," because its assets are held in the name of the VSF fund only, and "shall not be used for any purpose other than for payment of variable supplements."[8] VSF funds also have a different Board of Trustees from that of the pension plan, a separate review procedure under state law, and are not listed in the trust instrument as one of the funds of the pension system.

Under Code § 401(a)(2) for the pension plan to be qualified it must be "impossible, . . . for any part of the corpus or income to be . . . used for, or diverted to, purposes other than for the exclusive benefit of his employees or their beneficiaries. . ." Thus, based upon the plain language of the qualification requirements for tax exemption, it is clear that the CITY Pension Funds do not qualify for tax exempt status because they still divert "corpus or income" to a "separate" fund to pay "non-pension" VSF benefits. *See*, Rev. Rul. 73-534, 1973-2 CB 132 (overfunded pension

---

[7] *See, NYC Admin. Code* §§ 13-191[1](2)(b), 13-192[1](2)(b), 13-191[2](2)(b), 13-192[2](2)(b), 13-194(2)(b), 13-269(b), 13-279(b), 13-383(b) and 13-393(b)); *see, also, Gagliardo v. Dinkins, supra* (VSF funds are not pension funds).

[8] A "plan is a 'single plan' if and only if, on an ongoing basis, all of the plan assets are available to pay benefits to employees who are covered by the plan." 26 C.F.R. § 1.414(1)-1(b)(1); *see*, Rev. Rul. 81-137, 1981-1 C.B. 232 (if assets of subdivision of a trust are only available to provide benefits for employees of that subdivision, each subdivision constitutes a single plan).

plan loses qualified status with permitted transfer of surplus assets to another qualified pension plan); Private Letter Ruling 200216034, 2002 WL 599407 (IRS PLR) (identical case involving transfer of municipal pension assets from one municipal plan to a "separate" municipal plan held to be violation of exclusive benefits rule of § 401(a)(2)); Private Letter Ruling 9723033 (use of surplus assets of defined benefit plan to satisfy obligations of profit sharing plan violates exclusive benefit rule of § 401(a)(2)); Memorandum Dated June 14, 1972, from Tax Legislative Counsel to the Director, Miscellaneous and Special Provisions Tax Division (transfer of funds from retirement system to separate fund outside of retirement system violates section 401(a)(2)); General Counsel Memorandum 35030, 1972 WL 32303 (IRS GCM) (transfer of funds from plan encompassing all employees, to a separate plan encompassing only a portion of employees violates exclusive benefit rule); *cf. Cutaiar v. Marshall*, *supra*.

The Second Circuit's decision, therefore, completely disregards the plain language of the Code which conditions qualification in terms that require mandatory compliance. Code § 401(a)(2) ('*shall* constitute a qualified trust *if* it is impossible'); Code § 503(a)(1)(B) ('*shall* not be tax exempt *if* it has engaged in prohibited transactions'); *see, Mead Corp. v. Tilley*, 490 U.S. 714, 718 (1989) (Code conditions favorable tax treatment of the plan on satisfaction of "all liabilities with respect to employees and their beneficiaries under the [plan]" before plan assets may be diverted to others"). It is well settled that where the language of the statute "is plain . . . the sole function of the courts is to enforce it according to its terms . . ." *Caminetti v. United States*, 242 U.S. 470, 485-86 (1917).

Not only is the Second Circuit's decision contrary to the plain meaning of the statute, but allowing a plan to maintain its tax exempt status although it illegally diverts pension assets is also contradicted by the clear congressional purpose of Code § 503(a)(1)(B). Congress acknowledged in the legislative history of ERISA that loss of tax exempt status was mandatory. *See,* S.Rep. No. 383, 93d Cong., 1st Sess. at 94-95 (1973), U.S.Code Cong. & Admin.News 1974, p. 4978 (1974-4 C.B.Supp. 80, 173-74) (trust forming part of a qualified retirement plan loses its exemption from taxation if it engages in a prohibited transaction).

Therefore, under Code § 503(a)(1)(B), plan disqualification was the only remedy available for the CITY Pension Funds because they do not comply with the requirements set forth by Congress for tax exemption. *See,* Code § 401(a)(2) (plan shall only be tax exempt if it is impossible for corpus or income to be illegally diverted); Code § 503(a)(1)(B) (governmental plan *shall not* be tax-exempt if it engages in prohibited transaction); Mertens: Law of Federal Income Taxation, § 34:250-Effect of Engaging in Prohibited Transactions (2002) (penalty for engaging in prohibited transaction within governmental plan is the loss of exemption); 16 Cumb. L. Rev. 301, 315-16 (1985-1986) (government plans which engage in prohibited transactions will lose their tax exempt status); IRS Letter Ruling 8752002 (transfer of plan's assets from plan bank account to employer constituted a diversion of corpus and income of plan for purpose other than exclusive benefit, disqualifying plan).

Thus, contrary to the Second Circuit's decision, whether this Court reviews the plain language of the statute or the Congressional history, the IRS did not have the authority

to permit the CITY Pension Funds to maintain their tax exempt status because they still are illegally diverting pension assets.[9] *See,* 26 C.F.R. § 301.7121-1 (IRS is expressly prohibited from entering into this Closing Agreement which permits continuing diversions because the Closing Agreement did not "permanently and conclusively" remedy the infractions).

CONCLUSION

Accordingly, since petitioners have suffered injury[10] and have no adequate remedy at law,[11] the Second Circuit's

---

[9] Under Code § 503(c), to obtain restoration of tax-exempt status, the plan must not only be disqualified for one year, but the IRS must be satisfied that there will be no future prohibited transactions (*see,* 26 C.F.R. § 1.503(c)-1), and all the money illegally diverted must be restored. Rev. Rul. 67-9, 1967-1 CB 143 (employer must return plan to qualified status and remove existence of prohibited transaction before tax-qualified status can be restored); *see, generally,* Mertens: Law of Federal Income Taxation, § 34:250-Effect of Engaging in Prohibited Transactions (2002) (to reestablish exemption, the theft which constituted the prohibited transaction must be repaid).

[10] Petitioners have actual injury because the pension monies being illegally diverted are from an underfunded pension plan and thus, the underfunded assets are the accrued benefits of all the members of the pension plan. *See, Hughes Aircraft Company v. Jacobson,* 525 U.S. 432, 438-439 (1999) (members of pension system have an interest in their accrued benefits in a retirement system). Petitioners have also suffered injury because their statutory right recognized in *Tavannes, supra,* to be protected from the illegal diversion of pension assets has been violated. *Center for Auto Safety v. National Highway Traffic Safety Admin.,* 793 F.2d 1322 (D.C. Cir. 1986) ("injury can be found in the invasion of a statutory right, created by Congress").

[11] Since petitioners have no state right of action because their monthly pension benefits are still being paid, *Gagliardo v. Dinkins, supra,* and they have no private right of action to enforce the tax code,

decision to narrowly craft its interpretation of the Code to preclude the only right petitioner's have to redress the illegal diversion of pension assets, must be reversed.

For the foregoing reasons, the instant petition should be granted and the summary order should be reversed, in its entirety.

Dated: Garden City, New York
July 10, 2006

Respectfully submitted,

/s/_____

Kevin P. Fitzpatrick (KPF-2403)
Marschhausen & Fitzpatrick, P.C.
Attorney for Petitioners
500 Old Country Road, Suite 103
Garden City, New York 11530
(516) 877-7700

Trenton v. Scott Paper Co. 832 F.2d 806, 810 (3d Cir. 1987), review under the APA is the only remedy available to municipal pensioners to protect them from the illegal diversion of pension assets promised to them under the Code. *See, Tavannes, supra.*

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 04-6573-CV
Nov. 28, 2005

Michael BORRELLI, et al.,*

Plaintiffs-Appellants,

v.

SECRETARY OF TREASURY, Commissioner of the Internal Revenue, New York City Police Pension Fund, Fire Department Pension Fund, Martha E. Stark, William Thompson, Betsy Gotbaum, C. Virginia Fields, Marty Markowitz, Adolfo Carrion, Helen Marshall, City of New York, Mylan Denerstein, Horacio Starks, Diane Brather, Anthony Crowell, Stephen Carbone, Nicholas Visconti, Peter Gorman, Robert Straub, Kevin McAdams, James Slevin, Stephen Cassidy, John Driscoll, Anthony Garvey, Edward Mullins, Thomas Scotto, Scott Williamson, Mubarak Abdul-Jabar, John Puglissi, Patrick Lynch, Raymond W. Kelly, Michael Bloomberg, John J. Murphy, Carroll Haynes, Roger Toussaint, Lillian Roberts, James Molinaro,

Defendants-Appellees.

---

* In the official caption, Michael Borrelli is listed as the sole plaintiff and appellant. However, in fact there are hundreds of plaintiffs-appellants who are named on attached schedules. For the sake of judicial economy, only Borrelli is listed by name above.

Background: Members of city retirement funds sued Secretary of the Treasury, Commissioner of Internal Revenue, city, and funds' trustees, challenging agreement between city and Internal Revenue Service (IRS) respecting transfer of fund assets to variable supplement funds made in violation of Internal Revenue Code (IRC). The United States District Court for the Southern District of New York, Stein, *J.*, 343 F.Supp.2d 249, granted federal defendants' motion to dismiss for lack of subject matter jurisdiction and declined to exercise supplemental jurisdiction over claims against municipal defendants. Members appealed.

Holding: The Court of Appeals held that Administrative Procedure Act (APA) did not provide cause of action for funds' members to challenge IRS's decision not to revoke funds' tax-exempt status or waive federal government's sovereign immunity for such purposes.

Affirmed.

Appeal from the United States District Court for the Southern District of New York (Stein, *J.*).

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the decision of the district court be and hereby is AFFIRMED.

Kevin P. Fitzpatrick, Marshhausen & Fitzpatrick, P.C., Garden City, NY, *for Plaintiffs-Appellants*.

Ross E. Morrison, Assistant United States Attorney (Sara L. Shudofsky, Assistant United States Attorney, of counsel), for David N. Kelley, United States Attorney for

the Southern District of New York, New York, NY, *for Defendant-Appellee.*

Grace Goodman (Larry A. Sonnenshein, of counsel) for Michael A. Cardozo, Corporation Counsel of the City of New York, New York, NY, *for Defendant-Appellee.*

Present: MINER, KATZMANN, and WESLEY, *Circuit Judges.*

SUMMARY ORDER

Appellants Michael Borrelli and about 2500 other members of various New York City retirement funds appeal an order of the district court (Stein, *J.*) entered November 17, 2004 granting the federal defendants' motion to dismiss for lack of subject matter jurisdiction and declining to exercise supplemental jurisdiction over plaintiffs' claims against the municipal defendants. The parties' familiarity with the facts and procedural history of the case is assumed.

Plaintiffs assert that the Internal Revenue Service ("IRS") found the various funds at issue here to have engaged in a "prohibited transaction" within the meaning of 26 U.S.C. § 503(b). *See* 26 U.S.C. § 503(a)(1)(C) (stating that organization "shall not be exempt from taxation" if it has engaged in a prohibited transaction). They further assert that this statutory language is sufficiently mandatory to strip the IRS of any discretion as to whether to revoke defendants' tax-exempt status and to render the IRS's decision not to do so susceptible to judicial review. *See Heckler v. Chaney,* 470 U.S. 821, 834, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985) (permitting review of a decision not to

enforce where "the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers").

However, review of the record shows that the IRS did not find a "prohibited transaction," but only a violation of 26 U.S.C. § 401(a)(2), which requires that a qualified trust have a trust instrument whereby it is impossible to divert any part of the trust's corpus or income to any "purposes other than for the exclusive benefit of [the employer's] employees or their beneficiaries." Contrary to plaintiffs' apparent assumption, a violation of this provision does not automatically constitute a "prohibited transaction," which is a term of art for certain specified transactions. *See* 26 U.S.C. § 503(b). The tax code contains no mandatory language circumscribing the IRS's discretion in enforcing the exclusive benefit rule. Indeed, it is well established that the IRS has wide-ranging discretion to impose a "broad range of alternative remedies" beyond revocation of a fund's tax-exempt status in response to violations of the exclusive benefit rule. *Westchester Plastic Surgical Assocs., P.C. v. Comm'r of Internal Revenue*, 78 T.C.M. (CCH) 756, 1999 WL 1001183, 1999 Tax Ct. Memo LEXIS 423, at *22 (T.C.1999). Because "the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion," *Heckler*, 470 U.S. at 830, 105 S.Ct. 1649, the Administrative Procedure Act provides no cause of action for plaintiffs to challenge the federal defendants' actions and does not waive the federal government's sovereign immunity for these purposes. *See* 5 U.S.C. § 701(a).

For these reasons, we affirm the district court's decision to dismiss the claims against the federal defendants for lack of subject matter jurisdiction. Because the plaintiffs

have not appealed the district court's decision to decline supplemental jurisdiction over the claims against the municipal defendants, no claims remain, and we need not reach any of the other issues briefed by the parties.

Accordingly, we AFFIRM the judgment of the district court.

C.A.2 (N.Y.),2005.

Borrelli v. Secretary of Treasury

155 Fed.Appx. 556, 2005 WL 3150533 (C.A.2 (N.Y.)), 96 A.F.T.R.2d 2005-7199

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 03 Civ. 10089 (SHS).
Nov. 16, 2004.

Michael BORRELLI, et al.,

Plaintiffs,

v.

THE SECRETARY OF TREASURY, et al.,

Defendants.

Background: Current and former New York City employees sued Secretary of the Treasury, Commissioner of the Internal Revenue Service, City, and trustees of city pension funds, challenging agreement between City and Internal Revenue Service (IRS) that arose from transfer of funds' assets to variable supplement funds (VSF) in violation of Internal Revenue Code (IRC). Defendants moved to dismiss for lack of subject matter jurisdiction.

Holdings: The District Court, Stein, J., held that:

12(1) Treasury Secretary's choice to respond to City's violation through agreement waiving any sanction due to financial crisis triggered by September 11, 2001 attacks was discretionary action, and judicial review of such action thus was precluded by Administrative Procedure Act (APA);

15(2) District Court lacked subject matter jurisdiction to contemplate employees' request for mandamus relief; and

18(3) District Court would not exercise supplemental jurisdiction over claims against city defendants.

Motions granted.

Kevin P. Fitzpatrick, Marschhausen & Fitzpatrick, P.C., Garden City, NY, *for Plaintiff.*

OPINION AND ORDER

STEIN, District Judge.

This action represents the latest iteration in a long line of suits challenging the propriety of the establishment and funding of Variable Supplement Funds ("VSFs") by New York City for its police officers, firefighters and other public employees. *See McDonough v. City of New York,* 99 Civ. 12307, 2000 WL 1804137 at *2-4 (S.D.N.Y. Dec. 8, 2000) (describing the history of four previous litigations in federal and New York state courts). The gravamen of the complaint, which asserts 40 claims seeking, *inter alia,* declaratory and injunctive relief, an accounting, and the removal of certain public pension funds trustees, is that the three defendant pension funds—the New York City Employees Retirement System (the "NYCERS"), the New York City Police Pension Fund (the "Police Fund"), and the New York City Fire Department Pension Fund (the "Fire Department Fund")—violated Section 503 of the Internal Revenue Code, 26 U.S.C. § 503, by transferring assets to non-pension entities.

Plaintiffs are "active or retired members of the New York City Employees Retirement System, the Police Department Pension Fund or the Fire Department Pension Fund." (Complaint at ¶5). The defendants can be divided into two groups for convenience: the federal defendants-consisting of the Secretary of Treasury and the Commissioner of the Internal Revenue Service in their official capacities; and the New York defendants-consisting of the City of New York, the three pension funds, and various trustees of those funds. Three motions are currently pending before this Court: the federal defendants and the New York defendants have each moved to dismiss the complaint for lack of subject matter jurisdiction and plaintiffs have cross-moved for summary judgment in their favor.

Because plaintiffs have failed to demonstrate the existence of a valid waiver of the federal defendants' sovereign immunity, the motion of those defendants to dismiss the complaint for lack of subject matter jurisdiction is granted. As to the claims asserted against the New York defendants, no independent basis for federal subject matter jurisdiction exists. Furthermore, because the interests of judicial economy and comity also do not favor the retention of supplemental jurisdiction over those claims pursuant to 28 U.S.C. § 1367, the New York defendants' motion to dismiss the complaint is granted as well. Finally, plaintiffs' cross-motion for summary judgment is dismissed as moot.

BACKGROUND

The facts relevant to the establishment and operation of VSFs by the City of New York have been set forth in numerous prior judicial opinions and do not require yet another retelling. *See e.g., Castellano v. City of New York,* 142 F.3d 58, 63-66 (2d Cir.1998); *Gagliardo v. Dinkins,* 89

N.Y.2d 62, 68-72, 674 N.E.2d 298, 651 N.Y.S.2d 368 (1996); *Castellano v. Bd. of Trustees of Police Officers' Variable Supplements Fund,* 937 F.2d 752, 754-55 (2d Cir.1991); *Poggi v. City of New York,* 109 A.D.2d 265, 266-71, 491 N.Y.S.2d 331 (1st Dept.1985), *aff'd* 67 N.Y.2d 794, 501 N.Y.S.2d 324, 492 N.E.2d 397 (1986). Instead, this Court will only provide a brief summary of the factual allegations relevant to the resolution of the pending motions and any background information that will assist in understanding the issues at stake.

The NYCERS, the Police Fund, and the Fire Department Fund are, respectively, the retirement funds for New York City employees, police officers, and firefighters. They were established as "qualified trust[s] within the meaning of § 401(a) of the Internal Revenue Code, 26 U.S.C. § 401(a)," thereby entitling their "members and retirees to exemptions from taxes under 26 U.S.C. § 501." (Compl. at ¶¶ 46, 186, 318).

A Variable Supplement Fund provides supplemental benefits "to certain city retirees in addition to regular pension or retirement benefits." *See Castellano v. City of New York,* 142 F.3d at 63 (internal citation omitted). In 1970, the relevant trust instruments for the Police Fund and the Fire Department Fund were amended to create VSFs, (Complaint at ¶¶ 186-88; 318-20), and in 1987 and 1999, similar amendments were made to the trust instrument for the NYCERS. (*Id.* at ¶¶ 46-49). As a result of those amendments, assets were transferred from the three pension funds to both their respective VSFs and defendant New York City. (*Id.* at ¶¶ 50-72; 189-210; 321-341). According to plaintiffs, well over $100 million of assets were removed from the corpus of the three pension funds as the result of those asset transfers.

Plaintiffs allege that those transfers of assets from the three pension funds violated the "exclusive benefit rule" applicable to public pension funds and thus constituted "prohibited transactions" as defined in Sections 401(a)(2) and 503(a)(1)(b) of the Internal Revenue Code, 26 U.S.C. §§ 401(a)(2), 503(a)(1)(b). (Compl. at ¶¶ 54-67; 191-209; 323-340). In January 2003, the City of New York entered into a Closing Agreement with the Internal Revenue Service (the "I.R.S.") relating to the creation and funding of the VSFs at issue.

That Closing Agreement acknowledges that the transfers of assets had been made in violation of 26 U.S.C. § 401(a)(2). (Closing Agreement at 3, attached to Compl. at Exhibit 1). However, the I.R.S. also agreed to "waive any sanction due from the City of New York as a result of the [violation of 26 U.S.C. § 401(a)(2)]" due to the unexpected financial crisis triggered by the September 11, 2001 attacks. (*Id.* at 4). Thus, the Closing Agreement stipulated that defendant public pension funds would be treated "as not having been disqualified as a result of the [transfers of assets];" instead, as an alternative remedy, the I.R.S. agreed to "treat subsequent contributions by the City of New York to [defendant public pension funds] as repayment of the [assets previously transferred]." (*Id.*) That agreement also required timely submission of proposed amendments to relevant New York State statutes to ensure future compliance with 26 U.S.C. § 401(a)(2). (*Id.* at 5).

Plaintiffs contend that, by entering into the January 2003 Closing Agreement with New York City, the federal defendants acted beyond the scope of their authority because they were mandated, as a matter of law, to disqualify the tax-exempt status enjoyed by the defendant public pension funds. (Compl. at ¶¶ 147-152) Thus, plaintiffs assert they are entitled to injunctive and declarative

relief to compel the federal defendants to disqualify the funds and to a writ of mandamus to compel the Commissioner of the I.R.S. to issue a letter of determination as to the tax-exempt status of NYCERS.

Plaintiffs further allege that the individual defendants-who were the trustees of the pension funds-violated their fiduciary duties by permitting the transfers of assets from those funds to New York City and the VSFs. (Compl. at ¶¶ 161-64). On that basis, plaintiffs seek an accounting and injunctions compelling those individual defendants to seek reimbursement of the transferred assets as well as determination letters from the I.R.S. (*Id.* at ¶¶ 166-67). Plaintiffs also seek the removal of the individual defendants from the boards of trustees of the funds. (*Id.* at ¶¶ 173-78).

LEGAL STANDARDS

A. Sovereign Immunity and Subject Matter Jurisdiction

Where a defendant moves to dismiss a complaint for lack of subject matter jurisdiction on the basis of sovereign immunity, "the plaintiff bears the burden of proving by a preponderance of the evidence that jurisdiction exists." *Chayoon v. Chao,* 355 F.3d 141, 143 (2d Cir.2004) (*per curiam*). The principle of sovereign immunity dictates, as the United States Court of Appeals for the Second Circuit recently noted, "that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." *Adeleke v. United States,* 355 F.3d 144, 150 (2d Cir.2004). For the purpose of sovereign immunity, a suit maintained against federal employees in their official capacities, as is the case with the federal defendants in this action, is deemed "a suit against the government" itself. *See King v. Simpson,* 189 F.3d 284, 287 (2d Cir.1999). Thus, a plaintiff must demonstrate that

jurisdiction over a claim for declaratory or injunctive relief against a federal employee in his or her official capacity is supported by a specific waiver of sovereign immunity by the United States, which "must be unequivocally expressed in statutory text." *See Adeleke,* 355 F.3d at 150.

B. Supplemental Jurisdiction

Pursuant to 28 U.S.C. § 1367, a district court may exercise supplemental jurisdiction over non-federal claims even after all claims arising under federal law have been dismissed. However, as the Second Circuit emphasized, "[in general] where the federal claims are dismissed before trial, the state claims should be dismissed as well." *Giordano v. City of New York,* 274 F.3d 740, 754 (2d Cir.2001) (quoting *Marcus v. AT & T Corp.,* 138 F.3d 46, 57 (2d Cir.1998)). In determining whether to retain jurisdiction over pendent state law claims, a court heeds considerations of judicial economy, convenience, fairness and comity. *See Carnegie-Mellon University v. Cohill,* 484 U.S. 343, 350 n. 7, 108 S.Ct. 614, 98 L.Ed.2d 720 (1988).

DISCUSSION

A. Subject Matter Jurisdiction over the Federal Defendants

Because this action is being maintained against the federal defendants in their official capacities, the burden rests upon the plaintiffs to identify specific waivers of sovereign immunity applicable to their claims.[1] Here, plaintiffs have

[1] The federal defendants have also challenged plaintiffs' standing to assert their claims. However, because a "lack of subject matter jurisdiction [due to a valid assertion of sovereign immunity] means that no one can have standing," this Court needs not engage in that inquiry. *See Lunney v. United States,* 319 F.3d 550, 560 (2d Cir.2003).

submitted two statutory bases for waivers: first, Section 702 of the Administrative Procedure Act, 5 U.S.C. § 702, which provides for judicial review of administrative actions; and second, 28 U.S.C. § 1361, which provides for jurisdiction to issue writs of mandamus.

1. Jurisdiction under the Administrative Procedure Act

A specific waiver of the United States' sovereign immunity exists for judicial review of agency action pursuant to 5 U.S.C. § 702. That section provides that an injunctive or declarative action, brought by "a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action ... shall not be dismissed ... on the ground that it is against the United States." *Id.* This Court's jurisdiction is not unbounded, however. As the Court of Appeals for the Second Circuit recently held, the Administrative Procedure Act (the "APA") "explicitly precludes any such review [where] ... agency action [at issue] is committed to agency discretion by law." *Riverkeeper, Inc. v. Collins,* 359 F.3d 156, 164 (2d Cir.2004) (quoting 5 U.S.C. § 701(a)(2)).

As a general matter, a type of action is committed to an agency's discretion if "a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Id.* (quoting *Heckler v. Chaney,* 470 U.S. 821, 830, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985)). Specifically, an agency's decision not to adopt a particular course of enforcement action is presumed to be exempted from judicial review, unless a plaintiff makes a showing that "the substantive statute contains guidelines for the agency to follow in exercising its enforcement powers." *Id.* at 165 (quoting *Chaney,* 470 U.S. at 833, 105 S.Ct. 1649); *see also New York State Elec. & Gas Corp. v. Saranac Power Partners L.P.,* 117 F.Supp.2d 211, 226 (N.D.N.Y.2000).

Here, plaintiffs are not challenging the federal defendants' determination that violations of 26 U.S.C. § 401(a)(2) occurred in connection with the transfers of assets from the pension funds. Rather, they are challenging the federal defendants' choice to enforce 26 U.S.C. § 503 through entering into the January 2003 Closing Agreement instead of disqualifying the pension funds. Thus, the presumption against judicial review applies and plaintiffs bear the burden to rebut that presumption. In an effort to do so, they point to the language of Section 503(a)(1)(B), which states, in relevant part, that a pension fund, such as the defendant funds, "*shall* not be exempt from taxation under section 501(a) if it has engaged in a prohibited transaction . . ." *Id.* (emphasis added). This, according to plaintiffs, clearly illustrates the non-discretionary nature of the federal defendants' duty to disqualify the pension funds from their tax-exempt status.

Plaintiffs have failed to rebut the presumption of the discretionary nature of the federal defendants' choice, however, because Section 503(a)(1)(B) merely sets forth the substantive standard to be enforced, but does not provide sufficient "guidelines for exercise for [their] enforcement power." *See Chaney,* 470 U.S. at 834, 105 S.Ct. 1649; cf. *Dunlop v. Bachowski,* 421 U.S. 560, 95 S.Ct. 1851, 44 L.Ed.2d 377 (1975). In other words, 26 U.S.C. § 503(a)-(1)(B) tells the I.R.S. *what* standard to enforce, but not *how* to enforce it.

Plaintiffs' reliance on *Watson v. Califano,* 487 F.Supp. 179 (S.D.N.Y.1979) and *MCorp v. Clarke,* 755 F.Supp. 1402 (N.D.Tex.1991) are unavailing for several reasons. First, *Watson* was decided several years prior to the United States Supreme Court's decision in *Heckler v. Chaney,* which set forth the presumption against reviewability of an

agency's decision not to enforce. Moreover, in *Watson*, Judge Sweet found that the wide discretion provided to the Secretary of Health, Education and Welfare precluded judicial review pursuant to the APA. *See id.*, 487 F.Supp. at 185-86. In *MCorp v. Clarke*, the court found that judicial review was appropriate where the Federal Deposit Insurance Corporation, "instead of providing a rescue," chose to "devise[ ] a way to bring the entire MBank network under its control." *See id.*, 755 F.Supp. at 1407. Those circumstances are a far cry from the I.R.S.'s choice of how to enforce a particular statutory provision that plaintiffs seek to have the court review here.

In sum, plaintiffs have not demonstrated their entitlement to judicial review of the I.R.S.'s decision to enter into the January 2003 Closing Agreement with New York City, instead of disqualifying the pension funds from tax-exempt status. Thus, the APA does not provide a valid waiver to the federal defendants' assertion of sovereign immunity and cannot support this Court's exercise of subject matter jurisdiction.

2. Mandamus Jurisdiction

28 U.S.C. § 1361 provides a district court with jurisdiction over "any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." *Id.* Because mandamus is an "extraordinary writ," the standard for its issuance is strict-in order for a writ of mandamus to issue, a plaintiff must show that (1) the plaintiff has "a right to have the act performed, (2) the defendant is under a clear non-discretionary duty to perform the act requested, and (3) plaintiff has exhausted all other avenues of relief." *City of New York v. Heckler*, 742 F.2d 729, 739

(2d Cir.1984); *see also Caremark Therapeutic Services v. Thompson,* 244 F.Supp.2d 224, 228 (S.D.N.Y.2003).

Plaintiffs seek a writ of mandamus "compelling the [federal] defendants to issue [a] determination letter on the tax exempt status of the NYCERS pension fund." (Compl. at ¶ 185). They assert that they have complied with the requirements for an appropriate request, including the payment of fees. (*Id.* at ¶ 181). However, as is evident from the text of the relevant internal revenue regulation, 26 C.F.R. § 601.201(*o*), plaintiffs are not entitled to the issuance of the determination letter requested because they are, with respect to NYCERS, neither an "employer" nor a "plan administrator." Moreover, even if they were so entitled, their proper recourse for the I.R.S.'s failure to issue a determination letter would be to seek a declaratory judgment before the United States Tax Court, pursuant to 26 U.S.C. § 7476(a)(2)(B), rather than a writ of mandamus from a district court. *See Wenzel v. Commissioner,* 707 F.2d 694, 696 (2d Cir.1983). In sum, because there is no "clear, non-discretionary duty" on the part of the federal defendants to issue the determination letter sought by plaintiffs, this Court lacks subject matter jurisdiction to contemplate plaintiffs' request for mandamus relief.

B. Subject Matter Jurisdiction over the New York Defendants

Plaintiffs' remaining claims against the New York defendants are based upon "the doctrines of ancillary and pendent jurisdiction," (Compl. at ¶ 1), traditional notions which are subsumed into the concept of supplemental jurisdiction pursuant to 28 U.S.C. § 1367. In light of the dismissal of all claims asserted against the federal defendants, the court is required to "reassess" its jurisdiction

over the case and may decline to exercise supplemental jurisdiction over the remaining claims pursuant to 28 U.S.C. § 1367(c)(3). *See Motorola Credit Corp. v. Uzan,* 388 F.3d 39, 56 (2d Cir.2004).

Plaintiffs urge that the Court should exercise supplemental jurisdiction over the remaining claims because they require interpretation of the Internal Revenue Code to determine the scope of the New York defendants' breach of fiduciary obligations. That contention is, however, without any support in the text of the complaint. Indeed, all the claims asserted against the New York defendants are premised on plaintiffs' contention that, under New York law, New York City and the trustees of the three pension funds breached their fiduciary duty to the beneficiaries of those funds. (Compl. at ¶¶ 161, 172, 175-77, 213, 249, 299, 309-16, 430-33, 440-43). Judicial economy and comity both counsel in favor of declining to exercise supplemental jurisdiction over the state law claims against the New York defendants.

CONCLUSION

For the reasons set forth above, the motions of the federal defendants and the New York defendants to dismiss the complaint are granted and plaintiffs' cross-motion for summary judgment is dismissed as moot. The claims against the New York defendants are dismissed without prejudice.

SO ORDERED:

S.D.N.Y.,2004.

Borrelli v. Secretary of Treasury

343 F.Supp.2d 249, 2005-1 USTC P 50,150, 94 A.F.T.R.2d 2004-6947

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Roseann B. MacKechnie
CLERK

Date:	3/29/06
Docket Number:	04-6573-cv
Short Title:	Borelli v. Secretary of Treasury
DC Docket Number:	03-cv-10089
DC:	SDNY (NEW YORK CITY)
DC Judge:	Honorable Sidney Stein

[Oval Stamp:]
United States Court of Appeals
Second Circuit
FILED
APR 24 2006
ROSEANN B. MACKECHNIE, CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 24th day of April, two thousand six.

BORELLI v. SECRETARY OF TREASURY

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant, Michael Borelli. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,
Roseann B. MacKechnie, Clerk

By: [ILLEGIBLE] HELLER
Motion Staff Attorney

[Page 1 of 6]
Closing Agreement with the City of New York

TAXPAYER'S COPY

**DEPARTMENT OF TREASURY—
INTERNAL REVENUE SERVICE**

REPLICATED
FORM 906

CLOSING AGREEMENT OF FINAL DETERMINATION COVERING SPECIFIC MATTERS

Under section 7121 of the Internal Revenue Code of 1986 (hereinafter the "Code"), the Commissioner of the Internal Revenue Service (hereinafter the "Commissioner") and the City of New York, of One Centre St., Municipal Building, New York, NY 10007, EIN 13-6400434 make the following closing agreement:

WHEREAS, the Commissioner has conducted an examination of the New York City Police Department Pension Fund, the New York Fire Department Pension Fund, and the New York City Employees' Retirement System;

WHEREAS, in 1970, the New York State Legislature enacted legislation establishing the Police Officer's Variable Supplements Fund ("POVSF") and Police Superior Officers' Variable Supplements Fund ("PSOVSF") within the New York City Police Pension Fund;

WHEREAS, in 1970, the New York State Legislature enacted legislation establishing the Firefighters' Variable Supplements Fund ("FVSF") and Fire Officers' Variable

Supplements Fund ("FOVSF") within the New York City Fire Department Pension Fund;

WHEREAS, in 1987, the New York State Legislature enacted legislation establishing the Transit Police Officer's Variable Supplements Fund ("TPOVSF"), the **[Page 2 of 6]** Transit Police Superior Officers' Variable Supplement Fund ("TPSOVSF"), the Housing Police Officer's Variable Supplements Fund ("HPOVSF"), and the Housing Police Superior Officers' Variable Supplements Fund ("HPSOVSF") within the New York City Employees' Retirement System;

WHEREAS, in 1999, the New York State Legislature enacted legislation establishing the Correction Officers' Variable Supplements Fund ("COVSF"), and the Correction Captains' And Above Variable Supplements Fund ("CCAVSF") within the New York City Employees' Retirement System and, in 2000, enacted legislation combining the COVSF and CCAVSF into a single VSF, the Correction Officers' Variable Supplements Fund ("COVSF");

WHEREAS, under the original enacting statutes, the VSFs were funded by the transfer of certain equity earnings from the New York City Police Pension Fund, the New York Fire Department Pension Fund, and the New York City Employees' Retirement System to the respective VSFs;

WHEREAS, under the original enacting statutes, the amount of benefits to be paid in any given year, if any, was within the sole discretion of the Boards of Trustees of the various VSFs, subject to the supervision of the New York State Department of Insurance;

WHEREAS, the New York State Legislature subsequently enacted legislation providing that the benefits payable by the VSFs would be a defined annual amount payable to each VSF beneficiary;

WHEREAS, under subsequent statutes enacted by the New York State Legislature, the City of New York was permitted and/or required to make withdrawals **[Page 3 of 6]** from the VSFs, with the exception of the COVSF, upon the occurrence of certain contingencies;

WHEREAS, in consideration for certain moneys received from the six VSFs, referred to in the next paragraph, the City of New York guaranteed payment of the VSF benefits regardless of the Funds' equity investment performance;

WHEREAS, the City of New York received funds from the variable supplements funds (VSF) as follows:

1988	Police Officers' VSF	$ 75,000,000
1993	Police Superior Officers' VSF	$ 51,750,000
1989	Firefighters' VSF	$ 27,000,000
1994	Fire Officers' VSF	$ 14,385,000
1993	Transit Police Officers' VSF	$ 6,081,000
1995	Housing Police Officers' VSF	$ 2,770,000
	Total	$ 176,986,000

WHEREAS, the Commissioner has determined that the $176,986,000 the City of New York received from the six variable supplements funds was a reversion in violation of section 401(a)(2) of the Code;

WHEREAS, the City of New York does not agree with the Commissioner's determination that the $176,986,000

received from the six VSFs was a reversion in violation of section 401(a)(2) of the Code;

WHEREAS, the statutes governing the New York City Police Department Pension Fund, the New York Fire Department Pension Fund, and the New York City **[Page 4 of 6]** Employees' Retirement System do not contain provisions expressly complying with sections 401(a)(2) and 401(a)(9) of the Code;

WHEREAS, the City of New York has determined the execution of this Closing Agreement is in its best interest; and

WHEREAS, the Commissioner, through his authorized representatives, has determined the execution of this Closing Agreement is also in its best interests;

NOW, THEREFORE, IT IS HEREBY DETERMINED AND AGREED for federal income tax purposes that:

(1) Due to the unexpected fiscal crisis the City of New York is currently experiencing on account of the terrorist attacks of September 11, 2001, the Commissioner agrees to waive any sanction due from the City of New York as a result of the Commissioner's determination that the City of New York violated section 401(a)(2) of the Code.

(2) The Commissioner will treat the New York City Police Department Pension Fund, the New York Fire Department Pension Fund, and the New York City Employees' Retirement System, and the trusts thereunder, as not having been disqualified as a result of the transfer of $176,986,000.

(3) The Commissioner will treat subsequent contributions by the City of New York to the New York City Police

Department Pension Fund, the New York Fire Department Pension Fund, and the New York City Employees' Retirement System, as repayment of the $176,986,000 transfer.

(4) The Commissioner will not treat the transfers from the New York City Police Department Pension Fund, the New York Fire Department Pension Fund, and **[Page 5 of 6]** the New York City Employees' Retirement System to their respective VSFs as a violation of section 401(a)(2) of the Code, and the Treasury Regulations promulgated thereunder.

(5) The City of New York will prepare legislation to be submitted to the New York State Legislature to amend the statutes governing the New York City Police Department Pension Fund, the New York Fire Department Pension Fund, and the New York City Employees' Retirement System to comply with sections 401(a)(2) and 401(a)(9) of the Code within 30-days of the execution of this closing agreement.

Until the New York State Legislature enacts the legislation to amend the New York Police Department Pension Fund, the New York Fire Department Pension Fund, and the New York City Employees' Retirement System to comply with sections 401(a)(2) and 401(a)(9) of the Code, the City of New York will provide the Commissioner with updates as to the status of the proposed legislation every 90-days, commencing 120-days after the execution of this closing agreement.

(6) The terms of this Closing Agreement are confidential pursuant to section 6103 of the Code. However, the parties agree that the Commissioner (after consultation with the City of New York) may disclose information related to this

agreement to the extent the Commissioner deems necessary to clarify any matters pertaining to the contents of the closing agreement that are publicly discussed or otherwise disclosed in the public record.

This Closing Agreement is final and conclusive except:

(1) the matter it relates to may be reopened in the event of fraud, malfeasance, or misrepresentation of material fact;

[Page 6 of 6]

(2) it is subject to the Internal Revenue Code sections that expressly provide that effect be given to their provisions (including any stated exceptions for Code section 7121) notwithstanding any other law or rule; and

(3) if it relates to a tax period ending after the date of this Closing Agreement, it is subject to any law, enacted after the agreement date, that applies to that tax period.

By signing, the parties certify that they have read and agree to the terms of this Closing Agreement.

City of New York

By MICHAEL A. CARDOZO Date January 7, 2003
Michael A. Cardozo
Corporation Counsel of the City of New York

Internal Revenue Service

By CAROL D. GOLD Date January 31, 2003
Carol D. Gold
Director, Employee Plans

Title 5 United States Code, Section 702
Right of Review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

Title 26 United States Code, Section 401
Qualified pension, profit sharing, and stock bonus plans

(a) Requirements for qualification.—A trust created or organized in the United States and forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall constitute a qualified trust under this section—

* * *

(2) if under the trust instrument it is impossible, at any time prior to the satisfaction of all liabilities with respect to employees and their beneficiaries under the trust, for any part of the corpus or income to be (within the taxable year or thereafter) used for, or diverted to, purposes other than for the exclusive benefit of his employees or their beneficiaries (but this paragraph shall not be construed, in the case of a multiemployer plan, to prohibit the return of a contribution within 6 months after the plan administrator determines that the contribution was made by a mistake of fact or law (other than a mistake relating to whether the plan is described in section 401(a) or the trust which is part of such plan is exempt from taxation under section 501(a), or the return of any withdrawal liability payment determined to be an overpayment within 6 months of such determination).

Title 26 United States Code, Section 503
Requirements for exemption.

(a) Denial of exemption to organizations engaged in prohibited transactions.—

(1) General rule.—

* * *

(B) An organization described in section 401(a) which is referred to in section 4975(g)(2) or (3) shall not be exempt from taxation under section 501(a) if it has engaged in a prohibited transaction after March 1, 1954.

* * *

(b) Prohibited transactions.—For purposes of this section, the term "prohibited transaction" means any transac-

tion in which an organization subject to the provisions of this section—

(1) lends any part of its income or corpus, without the receipt of adequate security and a reasonable rate of interest, to;

(2) pays any compensation, in excess of a reasonable allowance for salaries or other compensation for personal services actually rendered, to;

(3) makes any part of its services available on a preferential basis to;

(4) makes any substantial purchase of securities or any other property, for more than adequate consideration in money or money's worth, from;

(5) sells any substantial part of its securities or other property, for less than an adequate consideration in money or money's worth, to; or

(6) engages in any other transaction which results in a substantial diversion of its income or corpus to;

the creator of such organization (if a trust); a person who has made a substantial contribution to such organization; a member of the family (as defined in section 267(c)(4) of an individual who is the creator of such trust or who has made a substantial contribution to such organization; or a corporation controlled by such creator or person through the ownership, directly or indirectly, of 50 percent or more of the total combined voting power of all classes of stock entitled to vote or 50 percent or more of the total value of shares of all classes of stock of the corporation.

(c) Future status of organizations denied exemption.—Any organization described in section 501(c)(17) or (18) or subsection (a)(1)(B) which is denied exemption

under section 501(a) by reason of subsection (a) of this section, with respect to any taxable year following the taxable year in which notice of denial of exemption was received, may, under regulations prescribed by the Secretary, file claim for exemption, and if the Secretary, pursuant to such regulations, is satisfied that such organization will not knowingly again engage in a prohibited transaction, such organization shall be exempt with respect to taxable years after the year in which such claim is filed.

Title 26 United States Code, Section 4975
Tax on prohibited transactions.

(a) Initial taxes on disqualified person.—There is hereby imposed a tax on each prohibited transaction. The rate of tax shall be equal to 15 percent of the amount involved with respect to the prohibited transaction for each year (or part thereof) in the taxable period. The tax imposed by this subsection shall be paid by any disqualified person who participates in the prohibited transaction (other than a fiduciary acting only as such).

(b) Additional taxes on disqualified person.—In any case in which an initial tax is imposed by subsection (a) on a prohibited transaction and the transaction is not corrected within the taxable period, there is hereby imposed a tax equal to 100 percent of the amount involved. The tax imposed by this subsection shall be paid by any disqualified person who participated in the prohibited transaction (other than a fiduciary acting only as such).

(c) Prohibited transaction.—

(1) General rule.—For purposes of this section, the term "prohibited transaction" means any direct or indirect—

(A) sale or exchange, or leasing, of any property between a plan and a disqualified person;

(B) lending of money or other extension of credit between a plan and a disqualified person;

(C) furnishing of goods, services, or facilities between a plan and a disqualified person;

(D) transfer to, or use by or for the benefit of, a disqualified person of the income or assets of a plan;

(E) act by a disqualified person who is a fiduciary whereby he deals with the income or assets of a plan in his own interest or for his own account; or

(F) receipt of any consideration for his own personal account by any disqualified person who is a fiduciary from any party dealing with the plan in connection with a transaction involving the income or assets of the plan.

(2) Special exemption.—The Secretary shall establish an exemption procedure for purposes of this subsection. Pursuant to such procedure, he may grant a conditional or unconditional exemption of any disqualified person or transaction, orders of disqualified persons or transactions, from all or part of the restrictions imposed by paragraph (1) of this subsection. Action under this subparagraph may be taken only after consultation and coordination with the Secretary of Labor. The Secretary may not grant an exemption under this paragraph unless he finds that such exemption is—

(A) administratively feasible,

(B) in the interests of the plan and of its participants and beneficiaries, and

(C) protective of the rights of participants and beneficiaries of the plan.

Before granting an exemption under this paragraph, the Secretary shall require adequate notice to be given to interested persons and shall publish notice in the Federal Register of the pendency of such exemption and shall afford interested persons an opportunity to present views. No exemption may be granted under this paragraph with respect to a transaction described in subparagraph (E) or (F) of paragraph (1) unless the Secretary affords an opportunity for a hearing and makes a determination on the record with respect to the findings required under subparagraphs (A), (B), and (C) of this paragraph, except that in lieu of such hearing the Secretary may accept any record made by the Secretary of Labor with respect to an application for exemption under section 408(a) of title I of the Employee Retirement Income Security Act of 1974.

(3) Special rule for individual retirement accounts.—An individual for whose benefit an individual retirement account is established and his beneficiaries shall be exempt from the tax imposed by this section with respect to any transaction concerning such account (which would otherwise be taxable under this section) if, with respect to such transaction, the account ceases to be an individual retirement account by reason of the application of section 408(e)(2)(A) or if section 408(e)(4) applies to such account.

(4) Special rule for Archer MSAs.—An individual for whose benefit an Archer MSA (within the meaning of section 220(d)) is established shall be exempt from the tax imposed by this section with respect to any transaction concerning such account (which would otherwise

be taxable under this section) if section 220(e)(2) applies to such transaction.

(5) Special rule for Coverdell education savings accounts.—An individual for whose benefit a Coverdell education savings account is established and any contributor to such account shall be exempt from the tax imposed by this section with respect to any transaction concerning such account (which would otherwise be taxable under this section) if section 530(d) applies with respect to such transaction.

(6) Special rule for health savings accounts.—An individual for whose benefit a health savings account (within the meaning of section 223(d)) is established shall be exempt from the tax imposed by this section with respect to any transaction concerning such account (which would otherwise be taxable under this section) if, with respect to such transaction, the account ceases to be a health savings account by reason of the application of section 223(e)(2) to such account.

* * *

(g) Application of section.—This section shall not apply—

(1) in the case of a plan to which a guaranteed benefit policy (as defined in section 401(b)(2)(B) of the Employee Retirement Income Security Act of 1974) is issued, to any assets of the insurance company, insurance service, or insurance organization merely because of its issuance of such policy;

(2) to a governmental plan (within the meaning of section 414(d)); or

(3) to a church plan (within the meaning of section 414(e)) with respect to which the election provided by section 410(d) has not been made.

In the case of a plan which invests in any security issued by an investment company registered under the Investment Company Act of 1940, the assets of such plan shall be deemed to include such security but shall not, by reason of such investment, be deemed to include any assets of such company.